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SELWYN'S ABRIDGMENT

OF THE

LAW OF NISI PRIUS.

VOL. I.

- | | |
|---|-----------------------------|
| 1. ACCOUNT. | 11. COMMON. |
| 2. ADULTERY. | 12. COSTS, CERTIFICATE FOR. |
| 3. AMENDMENT. | 13. COVENANT. |
| 4. ASSAULT AND BATTERY. | 14. DEBT. |
| 5. ASSUMPSIT. | 15. DECEIT. |
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| 7. AUCTION. | 17. DISTRESS. |
| 8. BARON AND FEME. | 18. EJECTMENT. |
| 9. BILLS OF EXCHANGE AND
PROMISSORY NOTES. | 19. EXECUTOR. |
| 10. CARRIERS. | 20. FACTOR. |
| | 21. FISHERY. |

Quilibet scriptor adeo anxie sit sollicitus, ut ad veritatem dicat, perinde ac si totius operis
fides uniuscujusque periodi fide niteretur.

PREF. 6 REP.

THIRTEENTH EDITION.

BY

DAVID KEANE, Q.C.,

RECORDER OF BEDFORD;

AND

CHARLES T. SMITH, M.A.,

ONE OF THE JUDGES OF THE SUPREME COURT OF THE CAPE OF GOOD HOPE.

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ADVERTISEMENT

TO THE THIRTEENTH EDITION.

THE alterations proposed in the Law of Bankruptcy, and called for by the Commercial Public, seem to the Editors a sufficient reason for omitting from these Volumes the Chapter with the title “Bankrupt.” An article on that subject will be published by the Editors soon after the passing of any general Act relating thereto.

TEMPLE, *Feb.* 1869.

PREFACE.

THE object of the following work is to investigate and explain that branch of jurisprudence, which teaches the nature and extent of the remedies prescribed by the law of England for the redress of private wrongs, or, as they are frequently termed, civil injuries. Considering the utility and importance of the subject, it cannot fail to excite the surprise of the reader, when he is informed that a well-digested treatise on the law of actions remained for so great a length of time a desideratum in the profession, that it was not until the year 1767, that an anonymous compilation, (the first deserving any notice,) entitled “An Introduction to the Law relative to Trials at Nisi Prius,” was published. The same work was *republished* by the late Mr. J. Buller, in the year 1772. Although the title-page is silent as to this being a second edition, yet, from an examination of the contents, it appears very clearly that Mr. J. Buller’s book is merely a republication of the anonymous treatise published in 1767. It is very remarkable, that so many different opinions should have existed as to the real author of this compilation ; some persons having ascribed it to Mr. Ford, others to the late Mr. J. Clive, and others to Mr. Bathurst. It was the received opinion at the bar *ut ego audivi*, upon the first appearance of this work, that it had been compiled by Mr. Bathurst (who was created Lord Apsley in 1771, and succeeded his father Allen, Earl Bathurst, in 1775,) for his own private use ; but the dedication by Mr. Buller to Lord Apsley, prefixed to the edition in 1772, which must have escaped the notice of those persons who ascribed this work to a different author, places the question beyond

the reach of controversy. That dedication expressly recognizes this treatise as owing its origin to a collection of notes formerly made by Mr. Bathurst for his own private use. This book, having passed through several editions, was succeeded by a similar work, entitled "A Digest of the Law of Actions and Trials at Nisi Prius," by Mr. Espinasse, of which there have been four editions. The Compiler of the following pages conceived that a treatise intended as a companion at the sittings in London and Middlesex, and on the Circuit, might be cast into a more convenient form than that adopted by either of the former writers : and that the cases might be abridged with greater accuracy and precision. Under this impression, the Abridgment of the Law of Nisi Prius was prepared and published in three parts successively, in the years 1806, 1807, 1808.

W. SELWYN.

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TABLE OF ABBREVIATIONS.

A. & E.	Adolphus and Ellis's Reports.
Add. E. R.	Addams's Ecclesiastical Reports.
Aleyne	Aleyne's Reports.
Ambl.	Ambler's Reports.
And.	Anderson's Reports.
Andr.	Andrews's Reports.
A. P. B. Dampier MSS. }	Ashurst J., Paper Book (1).
L. I. L. }	
Aston's Ent.	Aston's Entries.
Atk.	Atkyns's Reports.
Bac. Abr.	Bacon's Abridgment.
B. & A.	Barnewall and Alderson's Reports.
B. & Ad.	Barnewall and Adolphus's Reports.
B. & C.	Barnewall and Cresswell's Reports.
Batty	Batty's Irish Reports.
Beav.	Beavan's Reports.
Beaw.	Beawes's Lex Mercatoria.
Bingh.	Bingham's Reports.
Bingh. N. C.	Bingham's New Cases.
Bl. Comm.	Blackstone's Commentaries.
Bl. H.	Henry Blackstone's Reports.
Bl. R.	Mr. Justice Blackstone's Reports.
Bli.	Bligh's Reports of Cases in the House of Lords.
Bli. N. S.	Bligh's New Series.
Bos. & Pul.	Bosanquet and Puller's Reports, in 3 vols.
Bos. & Pul. N. R.	Bosanquet and Puller's New Reports.
B. P. B.	Paper Book of Buller, J. (2).
Bro. Abr.	Brooke's Abridgment.
Broderip	Broderip's Reports.
Brod. & Bingh.	Broderip and Bingham's Reports.
Bro. Ca. C.	Brown's Reports of Cases in the Court of Chancery.
Bro. P. C.	Brown's Cases in Parliament.
Brownl.	Brownlow's Reports.
Bull. N. P.	Buller's Nisi Prius.
Bulst.	Bulstrode's Reports.
Bunb.	Bunbury's Reports.
Burn E. L.	Burn's Ecclesiastical Law.
Burr.	Burrows' Reports.
Burr, S. C.	Burrows' Settlement Cases.
Campb.	Campbell's Nisi Prius Cases.
Carth.	Carthew's Reports.
Ca. Temp. Holt	Cases in the time of Holt, Chief Justice of King's Bench.
C. T. H.	Cases in the time of Lord Hardwicke.
C. T. N.	Cases in the time of Lord Chancellor Northington.
C. & P.	Carrington and Payne's Reports.
C. T. T.	Cases in the time of Lord Chancellor Talbot.
Cl. & Fi.	Clark and Finnelly's Reports in House of Lords.

(1) These MSS. consist of the Paper Books of *Ashurst, J., Buller, J., Lawrence, J., and Dampier, J.*, in an uninterrupted series from T. T. 9 Geo. III., to M. T. 56 Geo. III. They are in Lincoln's Inn Library, and are referred to in the following pages as *P. B. Dampier, MSS. L. I. L.*, preceded by the initial of the judge.

(2) See note (1).

Clayton	Clayton's Reports.
Clift	Clift's Entries.
Co. R.	Coke's Reports.
Co. Ent.	Coke's Entries.
Co. Lit.	Coke upon Littleton.
Co. B. L.	Cooke's Bankrupt Law.
Coll.	Collyer's Reports, V.-C. Knight Bruce.
Com. R.	Comyns' Reports.
Com. Dig.	Comyns' Digest.
Comb.	Comberbach's Reports.
C. B.	Common Bench Reports.
C. B. N. S.	Common Bench Reports, New Series.
Cowp.	Cowper's Reports in the King's Bench.
Cox	Cox's Chancery Cases.
Cro. Car.	Croke's Reports in time of Charles I.
Cro. Eliz.	Croke's Reports in time of Elizabeth.
Cro. Jac.	Croke's Reports in time of James I.
Cr. & J.	Crompton and Jervis's Reports.
Cr. & Mee.	Crompton and Meeson's Reports.
Cr. M. & R.	Crompton, Meeson and Roscoe's Reports.
Cr. & P.	Craig and Phillips' Reports.
Curt. Ecc. Rep.	Curteis's Ecclesiastical Reports.
Dalton's Shff.	Dalton's Sheriff.
Dav.	Davis's Reports.
Degge	Degge's Parson's Companion.
De G.	De Gex's Report.
De G. & J.	De Gex's and Jones's Reports.
Doct. Pl.	Doctrina Placitandi.
Doct. & Stud.	Doctor and Student.
Doug.	Douglas's Reports in King's Bench.
D. & L.	Dowling and Lowndes's Reports.
Dowl. P. C.	Dowling's Practice Cases.
D. P. B.	Dampier J., Paper Book (3).
D. & R.	Dowling and Ryland's Reports in King's Bench.
Dyer	Dyer's Reports.
East, P. C.	East's Pleas of the Crown.
East	East's Reports in King's Bench.
Eden	Eden's Reports.
E. & B.	Ellis and Blackburn's Reports.
E. B. & E.	Ellis, Blackburn and Ellis's Reports.
E. & E.	Ellis and Ellis's Reports.
Eq. Ca. Abr.	Equity Cases abridged.
Exch.	Exchequer Reports.
Esp. N. P. C.	Espinasse's Nisi Prius Cases.
Fitzgib.	Fitzgibbon's Reports.
Fitz. Abr.	Fitzherbert's Abridgment.
F. N. B.	Fitzherbert's Natura Brevium.
Fort.	Fortescue's Reports.
F. & F.	Foster and Finlaison's Nisi Prius Reports.
Freem.	Freeman's Reports.
G. & D.	Gale and Davison's Reports.
Gilb. Debt	Gilbert's Treatise on Debt.
Gilb. R.	Gilbert's Reports.
Gilb. C. B.	Gilbert's History of Common Pleas.
Gilb. Evid.	Gilbert's Evidence.
Gouldsborough	Gouldsborough's Reports.
Gow's N. P. C.	Gow's Nisi Prius Cases.
Gundry	Gundry MSS. (4).

(3) See note (1), p. xcvii.

(4) These MSS. were purchased of Nathaniel Gundry, Esq., the only son of Mr. Justice Gundry, by whom the notes were taken; and will be found in Lincoln's Inn Library.

Gwm.	Gwillim's Tithe Cases.
Hagg. Cons.	Haggard's Consistory Reports.
Hagg. Ecc. R.	Haggard's Ecclesiastical Reports.
Hale, H. C. L.	Hale's History of the Common Law.
Hard.	Hardress's Reports.
Hare	Hare's Reports, V.-C. Wigram.
Hawk, P. C.	Hawkins's Pleas of the Crown.
H. Bl.	Henry Blackstone's Reports.
Hob.	Hobart's Reports.
Holt	Reports Temp. Holt, C. J., of the King's Bench.
Holt's N. P. C.	Holt's Nisi Prius Cases.
H. & C.	Hurlstone and Coltman's Reports.
H. L. Cas.	House of Lords Cases.
H. & N.	Hurlstone and Norman's Reports.
Inst.	Coke's Institutes.
Ir. L. R.	Irish Law Reports.
Jac.	Jacob's Reports.
J. & W.	Jacob's and Walker's Reports.
Jon. T.	Sir Thomas Jones's Reports.
Jones, W.	Sir W. Jones's Reports.
Jur.	The Jurist's Reports.
Jur. N. S.	The Jurist's Reports, New Series.
Keb.	Keble's Reports.
Keen	Keen's Reports.
Kenyon	{ Notes by Lord C. J. Kenyon, when at the Bar, Edited by Hanmer.
L. J. (N.S.)	Law Journal, New Series.
L. R.	Law Reports.
L. T.	Law Times Reports.
L. T. N. S.	Law Times Reports, New Series.
Lord Raym.	Lord Raymond's Reports.
Leon.	Leonard's Reports.
Lev.	Levinz's Reports.
Lib. Ass.	Liber Assisarum.
Lib. Int.	Liber Intrationum.
Lill. Ent.	Lilly's Entries.
L. I. L.	Lincoln's Inn Library.
Lit.	Littleton's Tenures.
L. M. & P.	Lowndes, Maxwell, and Pollock's Practice Cases.
L. P. B.	Paper Book of Lawrence, J. (5).
Lutw.	Lutwyche's Reports.
M'Clel.	M'Cleland's Reports.
M'Queen's H. of L. Ca.	M'Queen's House of Lords Cases.
M. & Y.	M'Cleland and Young's Reports.
Madd.	Maddock's Chancery Reports.
M. & Gr.	Manning and Granger's Reports.
March.	March's Reports.
Marsh, R.	Marshall's Reports.
Marsh.	Marshall on Insurances.
M. & S.	Maule and Selwyn's Reports.
M. & Ry.	Manning and Ryland's Reports.
M. & W.	Meeson and Welsby's Reports.
Mer.	Merivale's Reports.
Middx. Sit.	Sittings for Middlesex, at Nisi Prius.
Mod.	Modern Reports.
Mod. Ent.	Modern Entries.
Mont.	Montagu's Reports.
Mont. & A.	Montagu and Ayrton's Reports.
Mont. & B.	Montagu and Bligh's Reports.
Mont. & Ch.	Montagu and Chitty.
M. D. & D.	Montagu, Deacon, and De Gex's Reports.

TABLE OF ABBREVIATIONS.

Mont. & M'A.	Montagu and M'Arthur's Reports.
M. & Malk.	Moody and Malkin's Reports.
M. & Rob.	Moody and Robinson's Reports.
M. & P.	Moore and Payne's Reports.
Moore (C. P.)	Moore's Common Pleas Reports.
M. & Sc.	Moore and Scott's Reports.
Moor	Sir Francis Moor's Reports.
M. & Cr.	Mylne and Craig's Reports.
M. & K.	Mylne and Keene's Reports.
Nev. & Man.	Neville and Manning's Reports.
Nev. & P.	Neville and Perry's Reports.
N. R.	Bosanquet and Puller's New Reports.
Noy	Noy's Reports.
Owen	Owen's Reports.
Palm.	Palmer's Reports.
Park.	Parker's Reports.
Park's Ins.	Park, J. A. on Insurance.
Peake's Ad. Ca.	Peake's Additional Cases.
Peake's N. P. C.	Peake's Nisi Prius Cases.
P. & D.	Perry & Davison's Reports.
Phill.	Phillips' Reports.
Phill. Ecc. Rep.	Phillimore's Ecclesiastical Reports.
Phillipps' Ev.	Phillipps on Evidence.
Plowd.	Plowden's Commentaries.
Pollexf.	Pollexfen's Reports.
Postleth. Dict.	{ Postlethwayt's Universal Dictionary of Trade and Commerce.
Prec. in Chanc.	
Pri.	Precedents in Chancery.
P. Wms.	Price's Reports in the Court of Exchequer.
Q. B.	Peere Williams's Reports.
R. A.	Queen's Bench Reports.
Rast. Ent.	Rolle's Abridgments.
Raym.	Rastall's Entries.
Raym. T.	Lord Raymond's Reports.
Rep.	Sir Thomas Raymond's Reports.
Rep. Ch.	Sir E. Coke's Reports.
Rich. C. P.	Reports in Chancery.
R. T. H.	Richardson's Practice, Common Pleas.
R. T. H.	Reports time of Hardwicke, C. J. B. R.
Rob. A. R.	Reports time of Holt, C. J. B. R.
Rol. Abridg.	Robinson's Admiralty Reports.
Rol. R.	Rolle's Abridgment.
Rose	Rolle's Reports.
Run. Eject.	Rose's Cases in Bankruptcy.
Russ.	Runnington's Ejectment.
Russ. & M.	Russell's Reports.
Ry. & M.	Russell and Mylne's Reports.
Salk.	Ryan and Moody's Nisi Prius Reports.
Saund.	Salkeld's Reports.
Say.	Saunders's Reports.
Sch. & Lef.	Sayer's Reports.
Scott.	Schoale and Lefroy's Reports.
Scott's N. R.	Scott's Reports, C. P.
Sess. Ca.	Scott's New Reports.
Shep. Touch.	Session Cases.
Show.	Shepherd's Touchstone.
Show. P. C.	Shower's Reports.
Sidf.	Shower's Parliamentary Cases.
Sim.	Siderfin's Reports.
Sim. & St.	Simons's Reports.
Skin.	Simons and Stuart's Reports.
Sm.	Skinner's Reports.
Sm. & G.	Smale's Reports.
	Smale and Giffard's Reports.

TABLE OF ABBREVIATIONS.

ci

Starkie N. P. C.	Starkie's Nisi Prius Cases.
Str.	Strange's Reports.
Sty.	Style's Reports.
Sugd. V. & P.	Sugden's Law of Vendors and Purchasers (10th edit.)
Swanst.	Swanston's Reports.
Taunt.	Taunton's Reports.
Tidd. Pr.	Tidd's Practice.
T. R.	Durnford and East's Term Reports, K. B.
Turn.	G. Turner's Reports.
Turn. & R.	Turner and Russell's Reports.
Tyrw.	Tyrwhitt's Reports.
Tyrw. & G.	Tyrwhitt and Granger's Reports.
Vaugh.	Vaughan's Reports.
Ventr.	Ventris's Reports.
Ves.	Vesey, senr.'s, Reports.
Ves. jun.	Vesey, junr.'s, Reports.
Ves. & B.	Vesey and Beames' Reports.
Vet. entr.	Veteres Intrationes.
Vid. Ent.	Vidian's Entries.
Vin. Abr.	Viner's Abridgment.
Weekly Rep.	Weekly Reporter.
Went. Off. Exor.	Wentworth's Office of Executor.
West. C. T. H.	West's Cases in time of Lord Hardwicke.
Willes	Willes's Reports.
Wils.	Wilson's K. B. and C. P. Reports.
Winch.	Winch's Reports.
Winch. Ent.	Winch's Entries.
H. Wood.	Hutton Wood's Decrees in Tithe Cases.
Yelv.	Yelverton's Reports.
Younge	Younge's Reports.
Y. & C.	Younge and Collyer's Reports in Exchequer.
Y. & C. N. C.	{ Younge's and Collyer's New Cases in Chancery, V.-C. Knight Bruce.
Y. & J.	Younge's and Jervis's Reports.

AN ABRIDGMENT

OF

THE LAW OF NISI PRIUS.

CHAPTER I.

OF THE ACTION OF ACCOUNT.

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I. *In what Cases an Action of Account may be maintained.*

A PREFERENCE having, for many years, been given to the mode of proceeding by bill in a court of equity, the action of account has in a great measure fallen into disuse. It will not, therefore, be necessary to enter fully into the nature of this action, but briefly to apprise the reader in what cases it may be maintained, what pleas may be pleaded to it, and in what form judgment may be entered. To maintain an action of account (*a*), there must be either a privity in deed, by the consent of the party (for an action of account does not lie against a disseisor or other wrong-doer), or a privity in law, as in the case of a guardian, &c. By the common law, an action of account for the rents and profits may be maintained by the heir, after he has attained the age of fourteen years (*b*), against the guardian in socage (*c*); so at the

(*a*) 1 Inst. 172 a.

(*b*) Litt. s. 123; 1 Inst. 89 a.

(*c*) The guardian in socage, like all

other accountants, by the common law may claim an allowance of all his reasonable costs and expenses.

ACCOUNT.

common law account will lie against a bailiff (*d*) or receiver (*e*), and in favour of trade and commerce by one merchant against another (*f*). But this action did not lie for one joint-tenant, or tenant in common, against his companion, although he should have taken the whole profits to his own use, unless he had been appointed bailiff to render an account (*g*). But now, by 4 Ann. c. 16, s. 27, an action of account may be maintained by one joint-tenant or tenant in common (*h*), his executors or administrators, against the other, as bailiff, for receiving more than his share or proportion, and against the executors or administrators of such joint-tenant or tenant in common (*i*). One tenant in common brought an action of account against another (*k*), and charged him as bailiff and receiver. As to the account given against him as bailiff, the defendant entered into the account; and as to the account against him as receiver, demurred specially, because the plaintiff did not state by whose hands the defendant received the money: the court held the exception good, notwithstanding 4 Ann. c. 16, s. 27, for that statute only empowered the plaintiff to charge the defendant as bailiff; but as the plaintiff had gone further, and charged the defendant as receiver, he ought to have shown by whose hands he received the money, as was required by the common law (*l*). As the statute is a general one, it is not necessary for the plaintiff to set it forth or to refer to it; but he must set forth so much as to bring his case within it; and, therefore, in an action for account by one tenant in common against another upon this statute, the plaintiff must state in his declaration, and prove, that he and defendant were tenants in common, and that defendant has received more than his just share (*m*). It is not sufficient to charge defendant merely as bailiff (*n*). The heir of a tenant in common can maintain an action under the statute against his co-tenant for the rent which accrued during his father's life, the Statutes of Apportionment not applying to this case (*o*).

An action of account against a tenant in common on this statute differs from an action of account against a bailiff at common law; for a bailiff at common law is answerable, not only for his actual receipts, but for what he might by his industry or care have reasonably raised or made, deducting his reasonable costs and

(*d*) By bailiff is understood a servant who has administration and charge of lands, goods and chattels, to make the best benefit to the owner.

(*e*) 1 Inst. 172 a.

(*f*) *Per Tindal, C.J.*, in *Cottam v. Partridge*, 4 M. & G. 284.

(*g*) 1 Inst. 200 b.

(*h*) And the others (*semble*) need not be joined as plaintiffs. *Sturton v. Richardson*.

(*i*) No action for money had and re-

ceived will lie in such a case. *Thomas v. Thomas*, 5 Exch. 28; 19 L. J. (Exch.) 175, S. C.

(*k*) *Walker v. Holyday*, Com. 272.

(*l*) 1 Inst. 172 a.

(*m*) *Henderson v. Eason*, 17 Q. B. 701.

(*n*) *Wheeler v. Horne*, Willes, 208; *Sturton v. Richardson*, 13 L. J., Exch. 281; 13 M. & W. 17, S. C.

(*o*) *Beer v. Beer*, 12 C. B. 60; 21 L. J., C. P. 124.

charges; but, by the words of the statute, a tenant in common, when sued as bailiff, is answerable only for so much as he has actually received more than his just share and proportion (*p*); and it is not a receipt of more than his just share or proportion, if he has merely had the sole enjoyment of the property, even though, by the employment of his own industry and capital, he makes a profit by the enjoyment and takes the whole of such profit (*q*).

Where there is a running account between a merchant and broker, the proper remedy for recovering the balance is by an action of account and not of assumpsit (*r*); but for the balance of an account assumpsit lies, though the items on each side are numerous (*s*). In certain cases, however, an action of account is preferable (*t*). At the common law (*u*), executors in general could not have this action for an account to be made to the testator, because the account rested in privity; but the stat. West 2, 13 Edw. I. stat. 1, c. 23, gave this action to executors, and (according to Sir Edward Coke, 1 Inst. 89 b; 2 Inst. 404) the 31 Edw. III. stat. 1, c. 11, to administrators. The 25 Edw. III. stat. 5, c. 5, has extended the same remedy to the executors of executors. At the common law, this action did not lie *against* the executors of the accountant (*v*); but by 4 Ann. c. 16, s. 27, an action of account may be maintained against the executors or administrators of a guardian, bailiff or receiver. This action does not lie against an infant (*x*); nor by one executor against another (*y*), for the possession of the one is the possession of the other.

II. Of the Pleadings and Evidence.

It is not necessary to state in the declaration, that a reasonable time elapsed between the request to account and the commencement of the action (*z*). The defendant may plead in bar (*a*), that he was never bailiff or receiver; or that he has fully accounted (*b*);

(*p*) *Wheeler v. Horne*, Willes, 209, 210.

(*q*) *Henderson v. Eason*, 17 Q. B. 701.

(*r*) *Scott v. McIntosh*, 2 Campb. 238.

(*s*) *Tomkins v. Willshear*, 5 Taunt. 431. See also *Arnold v. Webb*, 5 Taunt. 432 n.

(*t*) *Wells v. Rose*, 7 Taunt. 402.

(*u*) Litt. s. 125; 1 Inst. 89 b, 90 b; 2 Inst. 403.

(*v*) These rules of the common law, viz.: 1, That account did not lie by executors (*Hargrave's Co.* Litt. 90 b, n. (3)); 2, That account could not be maintained against executors, had some exceptions. As to the first, an account might have been maintained at the common law by the executors of *merchants*; as to both,

in the case of the king, the action lay (F. N. B. 117; 11 Rep. 90 a). It should also be remarked, that though at the common law executors in general were not compellable to account; yet if they consented to settle an account they were liable to an action of debt for the balance (F. N. B. 267, Lord Hale's note).

(*x*) 1 Inst. 88 b; 1 Inst. 172 a; per Lord Hardwicke, C., in *Dormer v. Fortescue*, 3 Atk. 130. Hence an infant cannot be guardian in socage. 1 Inst. 88 b.

(*y*) F. N. B. 271, 4to edit. note (*f*).

(*z*) *Beer v. Beer*, 12 C. B. 60.

(*a*) 1 R. A. 121, L. 5; Rast. Entr. 17, 19, 21.

(*b*) *Baxter v. Hozier*, 5 B. N. C. 288.

or that he has accounted before auditors assigned by the plaintiff; or that he has accounted before to the plaintiff himself (c); or any matter which tends to show that he was never accountable, *e. g.* to an action under the 4 Ann. c. 16, facts showing that he is not tenant in common with the plaintiff (d); or a release. He cannot pay money into court (e). The 70th section of the Common Law Procedure Act, 1852, which provides for payment into court in *all* actions (with certain exceptions), only applies, it seems, to cases where the money is paid *in satisfaction* of the cause of action (f). When the plaintiff charges the defendant as receiver from such a time to such a time (g), the defendant must answer the whole time precisely (h). Actions of account must be commenced and sued within six years next after the cause of action, 21 Jac. I. c. 16, s. 3; 19 & 20 Vict. c. 97, s. 9 (i). And one item of claim in an account having arisen within the six years will not suffice to take the residue out of the statute. If the defendant plead that he was never receiver, he cannot give in evidence a bailment to deliver to another person, and that he has delivered accordingly: for though this special matter prove that he is not accountable, yet, as upon the delivery, he was accountable conditionally (*viz.* if he did not deliver over), the evidence does not support the plea (j). So a release cannot be given in evidence under the plea, that the defendant was never receiver (k). In account against the defendant as receiver by the hands of A., it is sufficient for the plaintiff to prove that A. directed the defendant to borrow of another to pay the plaintiff: that the defendant borrowed accordingly, and that A. gave a bond to the lender (l).

III. Of the Judgment.

1. *To account.*
2. *Final.—Execution.*

1. There are two judgments in this action:—the first judgment

(c) F. N. B. 117, D. note (d).
 (d) *Ricketts v. Loftus*, 14 Q. B. 482;
Gorely v. Gorely, 1 H. & N. 144.

(e) *Anon.*, Bull. N. P. 128.

(f) *Bishop of London v. M'Niel*, 23 L. J. Ex. 111; 9 Exch. 490, S. C.

(g) *Southcot v. Rider*, T. Raym. 57.

(h) It is a general rule in pleading that the plea must answer every material part of the declaration. If a plea begin with an answer to the whole, but in truth the matter pleaded be only an answer to part, the plea is bad and the plaintiff may demur; *Weeks v. Peach*, 1 Salk. 179; *Down v. Hatcher*, 10 A. & E. 121 (unless the point is doubtful, *per Patteson, J.*, in *Worley v. Harrison*, 3 A. & E. 675; in which case an application to amend should be made under the 52nd section

of the Common Law Procedure Act, 1852); but if the plea begin as an answer to part, and is in truth an answer to part only, the plaintiff ought not to demur, but to take his judgment for the part unanswered by *nil dicit*; 1 Saund. 28, n. 3; *Henry v. Earl*, 8 M. & W. 228; *Vincent v. Beston*, Lord Raym. 716; for if the plaintiff demurs, or pleads over, the whole action is discontinued. 1 Roll. Abrid. 487, pl. 10; *Market v. Johnson*, 1 Salk. 180; *Peers v. Henriques*, 2 Lord Raym. 841; Gilb. Hist. C. B. 155, 158.

(i) *Cottam v. Partridge*, 4 M. & Gr. 271; *post*, tit. Assumpsit.

(j) 2 Roll. Abrid. 683 (F.), pl. 1.

(k) *Willoughby v. Small*, 1 Brownl. 24.

(l) *Harrington v. Deane*, Hob. 36.

is, that the defendant do account (*m*), usually termed a judgment *quod computet* (*n*). This is in the nature of an award of the court, interlocutory only, and not definitive (*o*), and whereon error does not lie. It is, however, essentially necessary that this judgment should be entered (*p*); for where the defendant pleaded that he had fully accounted, and issue being joined thereon, the jury found for the plaintiff, and assessed damages and costs, and judgment was entered accordingly and execution taken out, the court, on motion, set aside the judgment and execution, observing that the judgment was wrong, for it ought to have been only a judgment to account: and they compared the irregularity in this case to the irregularity of signing final judgment before interlocutory judgment.

After the judgment to account, the defendant usually offers to account, and thereupon the court assigns auditors to take and declare the account between the parties. The auditors assigned (*q*) are, in general, some of the officers of the court, who may convene the parties before them from day to day, until the account is determined (*r*). If the auditors find the parties remiss and negligent, they must certify to the court that they will not account. By 4 Ann. c. 16, s. 27, the auditors are empowered to administer an oath, and examine the parties touching the matters in question, and for the trouble in auditing and taking such account shall have such allowance as the court shall judge reasonable, to be paid by the party on whose side the balance of account shall be. Special bail is not to be found until after judgment to account (*s*). If the defendant (*t*), after the judgment to account, does not personally appear in court to give bail to account, there must issue a *capias ad computandum* for the purpose of bringing him into court (*u*). With respect to pleading before the auditors, the following rules are to be observed:—1. In order to avoid trouble and charge to the parties (*x*), what might have been pleaded in bar to the action shall not be allowed as a discharge before the

(*m*) Co. Ent. 46 b; Rast. Ent. 17.

(*n*) The form of this judgment, in the case of *Godfrey v. Saunders*, 3 Wils. 88, was as follows:—"Therefore it is considered, that the defendant account with the plaintiff of the time aforesaid, in which he (defendant) and the said S. S. were the bailiffs of the plaintiff, and had the care and administration of the aforesaid goods and merchandizes, &c., to be merchandized and made profit of for plaintiff; and the defendant in mercy, &c., because he hath not before accounted," &c.

(*o*) *Metcalf's case*, 11 Rep. 38 a.

(*p*) *Hughes v. Burgess*, Ca. temp. Hard. 394.

(*q*) *Williams v. Lee*, 1 Mod. 42. See

the form, 3 Wils. 89.

(*r*) In *Godfrey v. Saunders*, C. B., 3 Wils. 73, the three prothonotaries were assigned auditors. See *Archer v. Pritchard*, 3 D. & R. 596; *Beer v. Beer*, 12 C. B. 82.

(*s*) *Reeves v. Gibson*, 1 Lev. 300. It was said, by all the prothonotaries in the Court of Common Pleas, that the defendant upon the first writ should not be held to special bail, yet, in special cases, by the discretion of the court, he shall find bail. Noy, 28.

(*t*) *Chester v. Hunt*, C. B. M. 13 Geo. II.

(*u*) *Pryor v. Pettingell*, 2 D. N. S. 755.

(*x*) *Taylor v. Page*, Cro. Car. 116; 3 Wils. 113, S. P.

auditors. 2. If the party is once chargeable and accountable (*y*), he cannot plead any matter in *bar*, except a release, or *plene computavit*; but must plead before the auditors. The exceptions proceed on this ground, that a release, and the having fully accounted, are total extinctions of the right of action (*z*), of which the court is to judge; and even in these cases they must be pleaded specially, and cannot be given in evidence on *ne unques receiver*. 3. Nothing can be pleaded before the auditors (*a*) contrary to what has been previously pleaded and found by verdict, because the consequences would be either two contradictory verdicts, which would perplex the court, or two similar verdicts, which would be nugatory. 4. If the defendant plead before the auditors (*b*) any matter in discharge which is denied by the plaintiff, so that the parties are at issue, the auditors must certify the record to the court, who will make such order for the summoning of a jury to try it, under the Common Law Procedure Acts of 1852 and 1854, as they think fit. See sects. 104 and 107 of the former act, and sect. 59 of the latter and 46th Pr. R., Hil. Term, 1853. If on the trial the plaintiff make default, he shall be nonsuited; but notwithstanding the nonsuit, he may, it seems, revive the first judgment in the manner pointed out by the 15 and 16 Vict. c. 76, s. 129, *et seq.*

2. The final judgment is (*c*), that the plaintiff do recover against the defendant so much as he, the defendant, is found in arrear (*d*). Error lies upon this last judgment only; but, although it may be found erroneous, and reversed, the first judgment shall stand in force, for the two judgments are distinct and perfect (*e*).

Execution.—It is not unworthy of remark, that this action is the first of a civil nature in which process of execution against the person was given. This process is given by stat. Westm. 3, 13 Ed. I. c. 11; but, under this act, the guardian in socage cannot be committed to prison, for he is *in loco parentis*, and the words of the statute are *de servientibus balivis, &c.*

(*y*) 3 Wils. 113, 114.

(*z*) 1 Brownl. 24, 25.

(*a*) 3 Wils. 114.

(*b*) Bull, N. P. 123.

(*c*) *Metcalfe's case*, 11 Rep. 40 a.

(*d*) The form of this judgment for the plaintiff upon demurrer to plea before the auditors, in *Godfrey v. Saunders*, 3 Wils. 94, was as follows:—"Therefore it is considered, that the plaintiff do recover against the defendant the aforesaid 12,000*l.* (the sum laid in the declaration), for the value of the goods and merchan-

dizes aforesaid, and also 278*l.* 7*s.* 9*d.* for his damages, as well by reason of the interpleading aforesaid, as for his costs and charges by the plaintiff in and about his suit in that behalf expended, to the said plaintiff by the court here adjudged with his assent; and that the said defendant be in mercy," &c.

(*e*) The reader who is desirous of further information concerning the nature of this action, is referred to the record and proceedings in the case of *Godfrey v. Saunders*, 3 Wils. 73.

CHAPTER II.

OF ADULTERY.

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I. *Of the Remedy for this Injury, and in what Cases an Action may be maintained.*

IN ancient times adultery was inquirable in tourns and leets (*a*), and punishable by fine and imprisonment; but at the present day the courts do not take any cognizance of it as a public wrong. Several attempts, indeed, have been made by the legislature to bring this offence within the pale of criminal jurisdiction, but they have, for the most part, been wholly ineffectual (*b*). During the time of the Commonwealth, in the year 1650, adultery was made a capital crime (*c*): but at the Restoration it was not thought proper to renew a law of such unfashionable rigour. Adultery at the present day is considered merely as a civil injury; and until the statute 20 & 21 Vict. c. 85, came into operation, the only remedy which the temporal courts afforded was an action, whereby the husband recovered against the adulterer a compensation in damages for the loss of the society, comfort and assistance of his wife in consequence of the adultery (*d*). By sect. 59 of the above

(*a*) 3 Inst. 206.

(*b*) In the year 1604 (2 Jas. I.) a bill was brought into parliament "For the better Repressing the detestable Crime of Adultery." This bill was committed, but when the report was made by the committee, the Earl of Hertford said, that they found the bill rather concerned some particular persons than the public good, whereupon the bill was dropped. See 5th vol. of Parl. Hist. p. 88. Another attempt was made in the year 1800, but failed; the bill passed the Lords, but was negatived in the Commons. Parl. Hist. vol. 35, pp. 225 to 325.

(*c*) The provisions of this act will be

found in Scobell's Acts, part 2, p. 121, fo. ed. See also 7 C. & P. p. 200, note (*a*).

(*d*) In *Wilton v. Webster*, 7 C. & P. 198, the plaintiff did not know of the adultery till his wife, about three weeks before her death, and then known to be dying, confessed it to him. From the disclosure to her death, he continued to treat her with great kindness. The action was commenced five days before she died. *Coleridge, J.*, directed that the plaintiff was entitled to damages for the shock to his feelings, and the loss of the society of his wife down to the time of her death.

statute this action was abolished; but inasmuch as the principles of law and rules of practice which governed it apply to the petition for damages, which is substituted for it by sect. 33, it is necessary to consider what the law and practice were upon this subject (e).

It was essentially necessary, in such an action, that the husband should present himself in court, as has been said, with clean

(e) Divorces were of two kinds, one partial the other total. Partial divorces were called divorces *à mensâ et thoro*, because they separated the married parties from each other's society, without dissolving the marriage union. They were granted at the suit of the husband or wife for adultery or cruelty. Total divorces were called divorces *à vinculo matrimonii*, because they dissolved that union altogether. They were granted at the suit of the husband or wife, *causâ præcontractûs* (abolished by 32 Hen. VIII. c. 38), *causâ metûs*, *causâ impotentie seu frigiditatis*, *causâ consanguinitatis*, &c., Co. Litt. 235. Divorces were originally only granted by the Ecclesiastical Courts, but strictly speaking they had no power of rescinding the marriage contract, which was by the law of England an indissoluble contract. Where they granted such a sentence it was grounded on some antecedent incapacity which rendered the marriage in reality void from the beginning, there being in fact no legal *vinculum* to dissolve. Such decrees were really decrees of nullity of marriage. They had no authority to dissolve a marriage, good in itself, whatever might be the delinquency of the parties. A practice grew up in consequence of this state of things of appealing to the legislature for a divorce *à vinculo matrimonii*, where the parties could afford the expense. (The first example of an actual dissolution of the nuptial ties by parliament was the case of the Countess of Macclesfield, Session 1697-8.) The proceeding was really a judicial one, although by a legislative process. A husband aggrieved only by adultery could demand, as it were, *ex debito justitiæ*, such a divorce, unless his own conduct had been censurable, but the wife could not obtain it except in cases of aggravated enormity, such as incestuous intercourse with a relation of the wife. By the parliamentary regulations the husband must have obtained a verdict for damages in a court of law against the adulterer, and also a divorce *à mensâ et thoro* before parliament would dissolve

the marriage (First Report, Divorce Commission, 1856). By the Divorce Act of 1857, all jurisdiction in matters matrimonial was taken away from the Ecclesiastical Courts, and vested in a new court, called the "Court for Divorce and Matrimonial Causes." No decree for a divorce *à mensâ et thoro* is to be made, but a decree for a judicial separation which the court may grant to the husband or the wife, on the ground of adultery, or cruelty, or desertion, without cause for two years. On adultery of the wife, or incestuous adultery, or adultery coupled with cruelty or desertion by the husband, a decree for the dissolution of the marriage may be granted. The action for criminal conversation is abolished, but a husband may either in a petition for dissolution of marriage, or for a judicial separation, or in a petition limited to such object only, claim damages from the adulterer, who is always to be a co-respondent to the petition. Such damages are to be determined by a jury, and the claim is to be tried on the same principles and subject to the same regulations as actions in crim. con. were tried, and the court may direct how the damages are to be applied. In all suits and proceedings except for dissolution of marriage, the court is to act on the principles and rules of the Ecclesiastical Courts, but the rules of evidence in the common law courts are to be observed in the trial of questions of fact. The court is, on a petition for a dissolution, to satisfy itself of the absence of connivance or condonation. In case the petitioner's case is proved, and the court has satisfied itself that there has been no connivance, condonation, or collusion, it must pronounce the decree unless the petitioner has been guilty of adultery, unreasonable delay, cruelty, desertion, wilful separation, or wilful misconduct conducing to the adultery, when the court is not bound to grant the decree. This act has been amended by the acts 21 & 22 Vict. c. 108; 22 & 23 Vict. c. 61; 23 & 24 Vict. c. 144; 27 & 28 Vict. c. 44; 29 & 30 Vict. c. 32.

hands, that is, without having, so to speak, courted his own dishonour, or having been acquiescent in his own disgrace; for if the husband had consented to, or provided means for, the adulterous intercourse of his wife with the defendant, the ground of the action was removed; for *volenti non fit injuria* (*f*). So it was ruled by *Kenyon*, C.J., that if the husband, after marriage, transgressed those rules of conduct which decency requires and affection demands from him, and in an open notorious and undisguised manner, carried on a criminal correspondence with other women, he could not maintain this action (*g*); but in a subsequent case, Lord *Alvanley*, C.J., held that the infidelity or misconduct of the husband could never be set up as a bar, but only in mitigation of damages, and that the only defence was where the husband was accessory to his wife's dishonour (*h*). So if a wife were suffered to live as a prostitute with the privity of the husband, and the defendant had thereby been drawn in to commit the act of which the husband complained, the action could not be maintained (*i*). But if the husband had been guilty of negligence merely, or inattention to the behaviour and conduct of his wife with the defendant, not amounting to a consent, such circumstances went in mitigation of damages only (*k*). In *Winter v. Henn*, 4 C. & P. 498, *Alderson*, J., in summing up, said, "I apprehend the law to be that the plaintiff will be entitled to recover, unless he has, in some degree, been a party to his own dishonour, either by giving his wife a general licence to conduct herself as she pleased with men generally, or by assenting to the particular act of adultery with this defendant, or by having totally and permanently given up all the advantage to be derived from her society. If you should be of opinion that the plaintiff has done any of these three things, then the defendant will be entitled to your verdict."

It has been held in the Divorce Court that condonation of adul-

(*f*) *Per de Grey*, C.J., in *Howard v. Burtonwood*, C. B. Middx. Sitt. after Trin. T. 16 Geo. II. Agreed by the court in *Duberley v. Gunning*, 4 T. R. 651, and there said by *Buller*, J., to be settled law.

(*g*) *Wyndham v. Lord Wycombe*, 4 Esp. N. P. C. 16; and *Sturt v. Marquis of Blandford*, there cited, both ruled by *Kenyon*, C.J.

(*h*) *Bromley v. Wallace*, 4 Esp. N. P. C. 237.

(*i*) *Per Lord Mansfield*, C.J., in *Smith v. Allison*, Bull. N. P. C. 27; *Hodges v. Windham*, Peake, N. P. C. 39.

(*k*) Agreed by the court in *Duberley v. Gunning*, 4 T. R. 651. "If the wife is a prostitute, and the husband is not privy to it, it goes only in mitigation of damages; but if he is consenting to it, or

otherwise connives at it, it takes away the ground of the action. If an illicit conversation be had, and he is not privy to it at the time, but knows of it afterwards and then receives her back, yet he may support an action, and the subsequent reconciliation goes only in mitigation of damages." *Per de Grey*, C.J., in *Howard v. Burtonwood*. In *Calcraft v. Earl of Harborough*, the plaintiff obtained a verdict, damages 100*l.*, although it was proved that the marriage had been concealed from the mother of the wife, and the husband very seldom saw his wife, and suffered her to remain with her mother, as if she were single, and to continue to perform at the theatre in her maiden name. 4 C. & P. 499, *Tindal*, C.J.

tery is a bar to any proceedings by the husband against the adulterer (*l*). So a co-respondent may set up in answer to a petition for dissolution, coupled with a claim for damages, a defence that would have been no bar to an action for crim. con., but which will justify the court in refusing to grant the decree under the discretionary power given by sect. 31; and the petitioner will not be entitled to recover damages on that petition, but will be in the position of a non-suited petitioner as to his claim for damages (*m*).

In an action for adultery with the plaintiff's wife, it appeared that the plaintiff and his wife had agreed to live separately: the plaintiff proved several acts of adultery committed by the defendant after the separation of the plaintiff and his wife, but there was not any direct proof of adultery *before* the separation. Lord *Kenyon*, C.J., being of opinion that the gist of the action was the loss of the comfort and society of the wife, which was alleged in the declaration in the usual manner, but was not supported by the evidence, nonsuited the plaintiff. On a motion for a new trial, the court concurred in opinion with the chief justice (*n*).

In a case (*o*), where the husband and wife had entered into a deed of separation with trustees, and the wife was living separate from the husband, though not in pursuance of the terms of the deed, at the time of the adulterous intercourse, Lord *Ellenborough*, C.J., said that he did not consider the question, "whether the mere fact of separation between husband and wife by deed was such an absolute renunciation of his marital rights, as prevented the husband from maintaining an action for the seduction of his wife," as concluded by the preceding decision in *Weedon v. Timbrell*. But in the case then before the court, the court were of opinion that, taking the whole deed into consideration, it was evident that the only separation in the contemplation of the parties was a separation *with the approbation of the trustees*, and that, as the wife had left the husband without such approbation, she was not at the time of the adulterous intercourse living separate from the husband *by his consent*, and consequently the event and situation provided for in the deed had not happened; that in that view of the case, there could not be any question, but that the plaintiff's right to recover was not affected by the deed; and further, if the wife had left the husband with the approbation of the trustees, yet as the deed had provided "that the wife might have the care of the younger children of the marriage and visit the others, more especially when they should be ill, so as to require the attention of a mother," the husband had not (as it was held that he had done in the case of *Weedon v. Timbrell*) given up all

(*l*) *Norris v. Norris*, 30 L. J. Mat. 111.

(*m*) *Seddon v. Seddon and Doyle*, 31 L. J. Mat. 12. *Quære* whether he could afterwards file a petition limited to a claim for damages.

(*n*) *Weedon v. Timbrell*, 5 T. R. 357.

(*o*) *Chambers v. Caulfield*, 6 East, 244. See also *Winter v. Henn*, 4 C. & P. 498, *Alderson, J.*; and *Willon v. Webster*, 7 C. & P. 198, *Coleridge, J.*

claim to the benefit to be derived ~~from the society and assistance~~ of his wife ; and consequently, that the case of *Weedon v. Timbrell*, allowing it the fullest effect according to the terms of it, could not be considered as an authority against the plaintiff in this action.

Where several defendants had carried on an adulterous intercourse with the plaintiff's wife, the plaintiff could maintain separate actions, although the cause of action had accrued during the same period.

II. Of the Evidence, and herein of the Statutes relating to Marriage.

<i>Marriages Abroad</i>	22
<i>Proof of Adultery</i>	25

In *other actions*, evidence of cohabitation, general reputation, acknowledgment of the parties and reception by their friends, is sufficient to establish the relation of husband and wife. But in the action of crim. con., in order that it might not be converted to bad purposes, by persons giving the name and character of wife to women to whom they were not married, it was held necessary, where the fact of marriage between the parties was put in issue by the pleadings (*p*), for the plaintiff strictly to prove it, either by the testimony of some person who was present at the marriage, or by the production of the register, or of an examined (*q*) or certified (*r*) copy thereof, or by a sealed copy of the register from the General Registry Office (*s*), and proof of cohabitation and reputation was insufficient (*t*) ; but " if it were proved that the defendant had seriously or solemnly recognized that he knew that the woman he had lain with was the plaintiff's wife, it would be evidence proper to be left to a jury without proving the marriage" (*u*). In cases where the marriage was to be proved by the production of the register or copy, proof must also have been adduced of the identity of the parties. In *Birt v. Barlow*, Doug. 170, *Buller, J.*, observed, that it was not necessary to produce the original register, and that it was only where that was required that subscribing witnesses must be called: that in this case the wife's maiden name was Harriet Champneys ; and supposing a maid servant had proved

(*p*) *Kenrick v. Homer*, 26 L. J., Q. B. 214.

(*q*) *Sayer v. Glossop*, 2 Exch. 409 ; *Birt v. Barlow*, Doug. 170.

(*r*) Under 14 & 15 Vict. c. 99, s. 14, for although 6 & 7 Will. IV. c. 86, ss. 35, 36, authorize the clergyman, superintendent, registrars, to give certified copies of the local registers, that act does

not make such copies evidence.

(*s*) 6 & 7 Will. IV. c. 86, s. 38.

(*t*) *Morris v. Miller*, 4 Burr. 2057 ; 1 Bl. R. 632, S. C. ; *Birt v. Barlow*, Doug. 174 ; *Catherwood v. Caslon*, 13 M. & W. 261.

(*u*) *Per Cur. Rigg v. Curgenvven*, 2 Wils. 399.

that she always went by that name till the day of the marriage, that she went out that day, and on her return and ever since had been called Mrs. Birt, that would have been evidence of the identity. An omission in the parish register of the signatures of the minister, parties and witnesses, has been held not to affect the validity of a marriage, *quoad* a parish settlement, where it was clearly proved *aliunde* that a marriage had actually taken place (*x*).

By stat. 3 & 4 Vict. c. 92, intituled "An Act for enabling Courts of Justice to admit Non-parochial Registers as Evidence of Births or Baptisms, Deaths or Burials, and Marriages," certain registers are to be deposited (*y*) in the custody of the registrar-general, after being certified (*z*) and identified (*a*) by the commissioners therein mentioned, and are then to be deemed to be in legal custody (*b*), and to be receivable in evidence in all courts of justice, subject to the provisions contained in the act (*c*).

It is proposed now to make some remarks touching marriage in general, in order that the reader may be apprised of the solemnities which the law deems essential to constitute a valid marriage. Under the English law previous to the 26 Geo. II. 133, a contract of matrimony could be made *per verba de presenti*, by a mutual promise of present matrimony. A contract *per verba de futuro*, by a mutual promise for future matrimony, if it were followed by cohabitation, stood upon the same footing as a contract *per verba de presenti*. But such contracts, although they were binding upon the parties, only constituted a sort of irregular marriage, and did not carry with them most of the consequences of a valid marriage. They had the following incidents: the engagement was indissoluble; the parties could not, even by mutual consent, release it; either party might compel solemnization *in facie ecclesiæ*; it had the effect of rendering a subsequent marriage solemnized *in facie ecclesiæ*, even after cohabitation and the birth of children, voidable. They did not, however, confer those rights of property or the more important right of legitimacy consequent upon a perfect marriage. To constitute such a marriage, the intervention of a third (*d*) person, episcopally ordained, was necessary. Although a marriage was considered a clandestine marriage unless it was solemnized in the church, still it was considered a complete and lawful marriage although performed out of the church, provided the contract was made in the presence and with the intervention of a priest in holy orders. Some religious ceremony was always necessary, although this differed at different times. Whatever

(*x*) *R. v. St. Devereux*, Burr. Settl. Ca. 506; 1 Bl. R. 367, S. C.

(*y*) Sect. 1. See Taylor on Evidence, vol. ii. p. 1280.

(*z*) Sect. 2.

(*a*) Sect. 4.

(*b*) Sect. 6.

(*c*) These provisions of 3 & 4 Vict. c. 92, are now extended by 21 Vict. c. 25, to certain other non-parochial registers certified as correct by commissioners appointed by the crown and deposited with the registrar-general.

(*d*) *Beamish v. Beamish*, 9 H. L. 274.

the spiritual courts thought sufficient, the common law courts acquiesced in (e).

A., a member of the Established Church in Ireland, went, accompanied by B., a Protestant dissenter, to the house of a regular Presbyterian minister of an Irish parish, and there entered into a present contract of marriage, the minister performing a religious ceremony. A. and B. afterwards cohabited for two years. This was held not to be a sufficiently valid marriage to support an indictment for bigamy against A. upon a subsequent marriage by him (f).

B., a clergyman in holy orders of the United Church of England and Ireland, performed a ceremony of marriage between himself and a lady, a Protestant, by reading, in a room in a private house, the form for the solemnization of matrimony as set forth in the Book of Common Prayer. No witness was present at the performance of the ceremony, but it was observed though not heard by a third party, without the knowledge of the parties themselves. The ceremony was followed by consummation, and there having been issue, the question was raised whether, according to the law of Ireland, which at that time was the same as that of England before Lord Hardwicke's Act, the marriage was valid and the issue legitimate, and it was decided in the negative (g).

Where the marriage ceremony was performed in a private lodging by a Roman Catholic priest, in the year 1705, upon evidence that the prisoner in answer to the question whether he would have the woman for his wedded wife said that he would, and that the woman answered affirmatively to the question put to her whether she would have Mr. Fielding for her husband, Mr. Justice Powell, upon a question of felony, considered it as a valid marriage contracted *per verba de presenti* (h).

Deaf and dumb persons may marry if of sufficient mental capacity to understand that by the act of marriage they contract to cohabit together, and with no one else (i).

During a long period, the 26 Geo. II. c. 33, Lord Hardwicke's Act, was the only statute relating to solemnization of marriage, but several statutes have since been made with a view to amend the provisions of that act; and finally it has been altogether repealed.

The first of these, *viz.* 3 Geo. IV. c. 75, after repealing the 11th sect. of the 26th Geo. II. c. 33, relating to marriages, by licence, of minors, without the consent of the proper parties, by sect. 2 enacts, that marriages solemnized by licence before the passing of this act, that is, before 22nd July, 1822, without the consent required by the

(e) *Reg. v. Millis*, 10 Cl. & F. 534, the opinion of Tindal, C.J., judgments of Lords Lyndhurst and Cottenham.

(f) *Queen v. Millis*.

(g) *Beamish v. Beamish*.

(h) *R. v. Fielding*, 5 St. Tr. 644, fol. ed.; *Jesson v. Collins*, Salk. 437; 6 Mod. 155.

(i) *Harrod v. Harrod*, 1 Kay & S. 4; S. C. 18 Jur. 853.

11th sect. of Lord Hardwicke's Act, shall be good (if not otherwise invalid), where the parties shall have continued to live together as husband and wife until the death of one of them, or until the passing of this act, or shall only have discontinued their cohabitation for the purpose or during the pending of any proceedings touching the validity of such marriage. [As to what shall not be a living together as husband and wife within this section, see *Poole v. Poole*, 2 Cr. & J. 66, and 2 Tyrw. 76.] But this act (sect. 3) is not to render valid any marriage which has been declared invalid by any court of competent jurisdiction before the 22nd of July, 1822, nor any marriages where either of the parties shall at any time afterwards have lawfully intermarried with any other person. [This 3rd section (which is not repealed by 4 Geo. IV. c. 76) (*k*), has a retrospective operation only; hence it has been held that a marriage which would have been void by the 11th section of Lord Hardwicke's Act, and had once been rendered valid by the 2nd section of the 3 Geo. IV. c. 75, cannot subsequently be rendered invalid by the marriage of either of the parties during the life of the other with a third person (*l*).] Nor is this act (s. 4) to render valid any marriage the invalidity of which has been established before the 22nd of July, 1822, upon the trial of any issue touching its validity, or touching the legitimacy of any person alleged to be the descendant of the parties to such marriage; nor (sect. 5) any marriage, where the validity thereof, or the legitimacy of descendants of the parties thereto, having been brought in question, in law or equity, judgments or decrees or orders have been made before the 22nd of July, 1822, in consequence of proof having been made of the invalidity of such marriage, or the illegitimacy of such descendants. The right and interest in property and titles of honour, which have been enjoyed upon the ground of the invalidity of any marriage, by reason that it was solemnized without such consent, shall not be affected by this act, although no sentence or judgment has been pronounced in any court against the validity of such (*m*). This statute shall not affect any act done before the 22nd of July, 1822, under the authority of any court, or in the administration of any personal estate, or the execution of any will, or performance of any trust (*n*). The remaining sections of this statute, from the 8th to the 26th, were repealed by the 4 Geo. IV. c. 17, (26th March, 1823), which was also repealed by stat. 4 Geo. IV. c. 76, except as to any act done under its provisions, and also except as to its repealing the clauses contained under any former act (*o*).

The statute, 4 Geo. IV. c. 76, repealed so much of Lord Hardwicke's Act as was then in force, from the 1st Nov. 1823. The

(*k*) *Rose v. Blakemore*, Ryan & Moody,
382.

(*l*) *R. v. St. John Delpike*, 2 B. & Ad.
226.

(*m*) Sect. 6.

(*n*) Sect. 7.

(*o*) See *Rose v. Blakemore*, Ry. & Mo.
382.

principal provisions are as follow:—The 2nd section relates entirely to the mode in which banns shall be published. The 3rd section empowers bishops to authorize publication of banns in chapels.

By sect. 7, no minister is obliged to publish banns, unless the persons to be married shall seven days before first publication deliver to such minister notice in writing, dated on day of delivery, of their *true* Christian names and surnames, and of the houses of their respective abodes within the parish or chapelry, and of the time during which they have dwelt within.

By sect. 9, marriages not had within three months after the complete publication of banns, cannot be solemnized without republication of banns on three several Sundays in the form prescribed, unless by licence.

By sect. 14, before any licence (*p*) can be granted, one of the parties is personally to swear before the surrogate that there is no lawful cause or impediment to the marriage, and to certain other particulars.

By sect. 16, the father, if living, of any party under twenty-one years of age, such parties not being a widower or widow; or if the father shall be dead, the guardian of the person of the party so under age, lawfully appointed; and in case there shall be no such guardian, then the mother of such party, if unmarried; and if there shall be no mother unmarried, then the guardian of the person appointed by the Court of Chancery, if any, shall have authority to give consent to the marriage of such party, and such consent is hereby *required* for the marriage of such party so under age, unless there shall be no person authorized to give such consent.—The language of the foregoing section is merely directory; it does not proceed to make the marriage void, if solemnized without consent. Hence, where a marriage was solemnized by licence, the man being a minor, whose father was living, and who did not consent to the marriage; it was held, that the marriage was nevertheless valid (*q*).

In case the father or fathers of the parties to be married, or one of them, so under age, shall be *non compos mentis*, or the guardian, mother or any of them whose consent is necessary to the marriage of such party, shall be *non compos mentis*, or in parts beyond the seas, or shall unreasonably or from undue motives refuse their consent to a proper marriage, then any person desirous of marrying, in any of the before mentioned cases, may apply by petition to the lord chancellor, master of the rolls, or vice-chan-

(*p*) A licence is granted by the ordinary; it is nothing more than a dispensation from the necessity for the publication of banns—a licence for the solemnization of matrimony without the

publication of banns. This dispensing power was reserved to our bishops by St. 25, Hen. VIII. c. 21, which took away that power from the pope.

(*q*) *R. v. Birmingham*, 8 B. & C. 29.

cellor, who are respectively empowered to proceed upon such petition in a summary way; and in case the marriage proposed shall upon examination appear to be proper, the said lord chancellor, &c., shall judicially declare the same to be so; and such declaration shall be as effectual as if the father or guardian, or mother of the person so petitioning, had consented to such marriage (*r*).

Whenever a marriage shall not be had within three months after the grant of a licence by any person having authority to grant such licence, no minister shall proceed to the solemnization of such marriage until a new licence shall have been obtained, unless by banns duly published (*s*).

If any persons shall *knowingly* and wilfully intermarry in any other place than a church or such public chapel wherein banns may be lawfully published, unless by special licence (*t*), or shall *knowingly* and wilfully intermarry without due publication of banns, or licence from a person having authority to grant the same, or shall knowingly and wilfully consent to or acquiesce in the solemnization of such marriage by any person not being in holy orders, the marriages of such persons shall be null and void (*u*).

In order to render a marriage void under this enactment, it must have been contracted by *both* parties with a knowledge that a due publication of banns had not taken place. Therefore, where the intended husband procured the banns to be published in a Christian and surname which the woman had never borne, but she did not know that *fact* until after the solemnization of the marriage; it was held that the marriage was valid (*v*). In *Wiltshire v. Wiltshire*, 3 Hagg. Ecc. Rep. 333, marriage by banns under a false publication, by the suppression of one of the husband's Christian names by which he was known, *with the knowledge and consent of both parties*, for the purpose of concealment, was held void under this 22nd section. So a marriage by banns, when the publication of banns was for the purpose of deceiving the man's grandfather, in the name of "John," instead of "Bowen," the real Christian name of the man, both parties being at the time of the solemnization of the marriage aware of such misdescription, and the woman believing on the representation of the man that the marriage would not thereby be invalidated, was, on a petition by the woman, pronounced null and void (*x*). But there is and always has been a great distinction between banns and licences. In licences the identity is the material circumstance, and a partial departure from the true

(*r*) Sect. 17.

(*s*) Sect. 19.

(*t*) The power of granting which was reserved to the Archbishop of Canterbury, by s. 20.

(*u*) Sect. 22. But see *post*, p. 19, 6 &

7 Will. IV. c. 85.

(*v*) *R. v. Wroton*, 4 B. & Ad. 640, and 3 Nev. & M. 712. See *Wright v. Elwood*, 1 Curt. Ecc. R. 662.

(*x*) *Midgley (falsely called Wood) v. Wood*, 30 L. J. Mat. 57.

name, for the purpose of concealing the marriage, is, in the case of a licence no cause of nullity if the altered name may represent the person. A marriage was solemnized by virtue of a licence in which the name of the woman was stated to be "Margaret Bevan," whereas her baptismal name, and that by which she was commonly called, was "Margaret Lea Bevan." The licence was obtained in the altered name by the man, knowingly and by the direction of the woman, in order that the surrogate might not know who she was, and that the marriage might be kept secret from her friends. It was held, in a suit for nullity instituted by the woman, that as the name M. B. might represent her, and the licence was obtained by her direction in that name, the marriage was not void, as having been solemnized without licence (y). The marriage of parties under a licence from a person not having authority to grant the same, is not void under this section, unless both parties knowingly and wilfully intermarry by virtue of such licence (z).

The second section of Lord Hardwicke's act required a notice in writing of the true christian and surnames to be delivered to the minister, and the 8th section enacted that all marriages solemnized without publication of banns or licence should be void. Now it was held by Lord *Stowell* (a), that the intention of this act was, that the true names should be published, and that if they were not, there was no publication. It would seem, therefore, that when the description has been made with the knowledge of both parties, the law as applicable to the old statute is also applicable to the statute of Geo. IV. The following cases were decided upon the old statute. A person whose baptismal and surname was Abraham Langley was married by banns by the name of George Smith, having been known in the parish where he resided and was married by that name only, from the time of his first coming into the parish till his marriage, which was about three years: it was held that the marriage was valid (b). In the publication of banns, a woman named Mary Hodgkinson was called White, a surname entered by mistake in the register of her baptism, but which she had never gone by nor been entitled to. No individual having any interest in the marriage was deceived; it was held that the marriage was void (c). In this case, Lord *Tenterden*, C.J., stated the result of the decisions thus:—"The clear intention of the legislature was, that the banns are to be published in the true names of the parties, otherwise it is no publication at all. By the decisions these rules are established:—First, that if there be a total variation of a name or names; that is, if the banns are published in a name or names totally different from those which the parties, or one of them, ever used, or by which they were ever

(y) *Bevan v. M'Mahon*, 30 L. J. Mat. 61.

(z) *Dormer v. Williams*, 1 Curt. Ecc. R. 870.

(a) *Ponget v. Tomkins*, 2 Hag. Con. 142.

(b) *R. v. Billinghamurst*, 3 M. & S. 250.

(c) *R. v. Tibshelf*, 1 B. & Ad. 190, recognized in *Allen v. Wood*, 1 Bing. N. C. 8.

known, the marriage in pursuance of that publication is invalid; and it is immaterial in such cases whether the misdescription has arisen from accident or design, or whether such design be fraudulent or not. But, secondly, if there be a partial variation of name only, as the alteration of a letter or letters, or the addition or suppression of one christian name, or the names have been such as the parties have used and been known by at one time, and not at another; in such cases the publication may or may not be void; the supposed misdescription may be explained; and it becomes a most important part of the inquiry whether it was consistent with honesty of purpose, or arose from a fraudulent intention."

When in a licence one of the parties was described by a name wholly different from his own, the marriage was held valid. But in this case, *Patteson, J.*, said that perhaps if a licence were obtained for one person with the intention that it should be used for another, such a licence might not be valid (*d*). So where a deserter had gone by an assumed name for sixteen weeks, in order more effectually to conceal himself from the military authorities, there being no fraud intended in respect of the marriage, it was held good (*e*).

If any valid marriage, solemnized by licence, shall be procured by a party to such marriage to be solemnized between persons, one or both of whom shall be under the age of twenty-one years, contrary to the provisions of this act, by means of such party falsely swearing to any matter to which such party is hereinbefore required personally to swear, such party shall forfeit all property accruing from the marriage, and the court of chancery is to settle it for the benefit of the innocent party or the issue of the marriage or any of them, as it shall think proper (*f*).

In order to preserve the evidence of marriages, and to make the proof thereof more certain and easy, and for the direction of ministers in the celebration of marriages and registering thereof, all marriages shall be solemnized in the presence of two credible witnesses, besides the minister who shall celebrate the same; and immediately after the celebration, an entry thereof shall be made in the register book kept for that purpose, in which it shall be expressed that the marriage was celebrated by banns or licence, and if both or either of the parties married by licence be under age, not being a widower or widow, with consent of the parents or guardians, as the case shall be; and such entry shall be signed by the minister with his proper addition, and also by the parties married, and attested by such two witnesses; which entry shall be made in the form therein set forth (*g*).

In consequence of a decision (*R. v. Northfield*, Doug. 658), which took place, confining the construction of Lord Hardwicke's act,

(*d*) *Lane v. Goodwin*, 4 Q. B. 361.

(*e*) *R. v. Burton on Trent*, 3 M. & S.

(*f*) Sect. 23. See *Attorney-Gen. v.*

Murray, 4 Russ. 329.

(*g*) Sect. 28.

26 Geo. II. c. 33, s. 1, to chapels existing at the time of passing the act, several statutes have been made from time to time, to give validity to marriages solemnized in chapels erected since Lord Hardwicke's act, and to make the registers of such marriages evidence. See stat. 21 Geo. III. c. 53; 44 Geo. III. c. 77; 48 Geo. III. c. 127; 6 Geo. IV. c. 92. Stat. 5 Geo. IV. c. 32; 11 Geo. IV. & 1 Will. IV. c. 18, relate to the solemnization of marriages where churches are rebuilding or under repair (*h*). See stat. 7 & 8 Vict. c. 56, concerning banns and marriages in district churches or chapels.

By stat. 5 & 6 Will. IV. c. 54, after reciting that marriages between persons within the prohibited degrees are voidable only by sentence of the ecclesiastical court pronounced during the lifetime of both the parties thereto, it is enacted, that all marriages celebrated before the 31st August, 1835, between persons within the prohibited degrees of affinity, shall not be annulled for that cause by any sentence of the ecclesiastical court, except in suits depending at that time; provided that nothing thereinbefore enacted shall affect marriages between persons within the prohibited degrees of consanguinity; and by sect. 2, *all marriages* celebrated after that time between persons within the prohibited degrees of consanguinity or affinity, are made absolutely void. This act, however, does not extend to Scotland (*i*).

The prohibited degrees are those enumerated by stat. 28 H. VIII. c. 7, s. 11, as being prohibited by God's law. Consequently, if a man marry his deceased wife's sister, and in the latter's lifetime marry another woman, he cannot be indicted for bigamy, inasmuch as the marriage with his deceased wife's sister was void; and the law extends to an illegitimate as well as to a legitimate child of the late wife's parents (*k*). The rule that a bastard is *nullius filius* applies only to inheritances (*l*). The statute also applies to all domiciled English subjects wherever they may be transiently resident, for although the general rule is that a foreign marriage, valid according to the law of a country where it is celebrated, is good everywhere, this only applies to the forms of entering into the contract: the essentials of the contract, such as the capacity of the parties to contract, and also the rights, duties, and obligations thence arising, depend upon the *lex domicilii*. Therefore, where a man married his deceased wife's sister in a foreign country where such a marriage according to the *lex loci* was valid, both the parties being domiciled British subjects, who had resorted to such country for the avowed purpose of evading the statute, the marriage was held void (*m*).

(*h*) See *R. v. Bowen*, 2 C. & K. 227.

(*i*) Sect. 3.

(*k*) *R. v. Chadwick*, 11 Q. B. 173; S. C., 17 L. J. M. C. 33.

(*l*) Co. Litt. 123; *R. v. Hodnett*, 1 T. R. 11.

(*m*) *Brook v. Brook*, 9 H. of L. 193, 27 L. J. Ch. 401.

Between 1754 and 1837, no *regular* marriage could, except by special licence, be celebrated in England in any other place than a church or chapel of the Established religion. To ease the scruples of those who objected to this, certain acts have been passed, whereby marriages may be celebrated in any place of religious worship under certain regulations. They are the 6 & 7 Will. IV. c. 85, "An act for marriages in England;" and the 6 & 7 Will. IV. c. 86, "An act for registering births, deaths, and marriages in England;" which were amended by 7 Will. IV. & 1 Vict. c. 22; the 3 & 4 Vict. c. 72, and the 19 & 20 Vict. c. 119. The following are some of the principal regulations prescribed by these acts:—Where any marriage may be celebrated after publication of banns, such marriage may be solemnized in like manner on production of the registrar's certificate, provided that the power of the archbishop of Canterbury to grant a special licence, and of the surrogate to grant a licence, is not affected (*n*). The notice to the superintendent registrar, and the issue of the superintendent registrar's certificate, shall be used and stand instead of the publication of banns to all purposes where no such publication shall have taken place, and every minister shall solemnize marriage after such notice and certificate as after due publication of banns (*o*).

A superintendent registrar shall have power to grant licences for marriage in any certified place of religious worship, registered for solemnizing marriages under the act (*p*).

Notice of every intended marriage shall be given by one of the parties to the superintendent registrar of the district within which they shall have dwelt for not less than seven days then next preceding, or if the parties live in different districts, the notice shall be given to the superintendent registrar of each district (*q*); in case of licence, notice to one registrar is sufficient (*r*), accompanied by a solemn declaration in writing at the foot of the notice, made in the presence of some registrar of the district, who shall attest the same, that there is no impediment of kindred or other lawful hindrance, &c. Persons making wilfully false declarations shall suffer the penalties of perjury (*s*). These notices shall be kept in the "Marriage notice book." If the marriage is to be without licence, a copy from the notice book is to be affixed in the superintendent registrar's office for twenty-one days, when the superintendent registrar shall give a certificate, provided no lawful impediment is shown and the issuing of the certificate is not forbidden (*t*). In case of marriage by licence, the superintendent registrar shall, after the expiration of one whole day next after the day of entry of notice, issue his certificate and also a licence, provided no lawful impedi-

(*n*) 6 & 7 Will. IV. c. 85, s. 1.

(*o*) 7 Will. IV. & 1 Vict. c. 22, s. 36.

(*p*) 6 & 7 Will. IV. c. 85, s. 11.

(*q*) Sect. 4. This does not apply to marriages by licence, or by special li-

cence, or after publication of banns.

(*r*) 19 & 20 Vict. c. 119, s. 6.

(*s*) Sect. 2.

(*t*) Sect. 4.

ment is shown, and the issuing the certificate is not forbidden (*u*). Every person whose consent is required by law may forbid the issuing of the certificate (*x*). If the marriage shall not be celebrated within three months of the entry of the notice, the notice, certificate, and licence shall be void (*y*). No certificate or licence can be granted out of a district except where there is no registered building, or the usual place of worship of the party is not within the district (*z*). Marriages may be solemnized (1) in the Established church (*a*); (2), in a certified place of worship registered under the act (*b*); (in the case of marriage by superintendent registrar's licence, the consent of the minister being necessary (*c*)); (3), at the superintendent registrar's office (*d*): Provided that in either of the latter cases the marriage shall be solemnized with open doors between the hours of eight and twelve in the forenoon, in the presence of some registrar of the district and of two or more credible witnesses, and that during some part of the ceremony each of the parties shall declare: "I do solemnly declare that I know not of any lawful impediment why I, A. B., may not be joined in lawful matrimony to C. D." And each of the parties shall say to the other, "I call upon these parties here present to witness that I, A. B., do take thee, C. D., to be my lawful wedded wife (or husband)" (*e*). If the marriage is at the office, the presence of the superintendent registrar also is required (*f*). After marriage at the office, persons may, if they like, add religious ceremony, if the minister thinks fit to perform it in the church or chapel whereof he is minister (*g*). If any valid marriage shall be had under the act by means of any wilfully false notice, &c., the guilty party shall forfeit all property accruing from the marriage as by 4 Geo. IV. c. 76 (*h*). If any persons shall knowingly and wilfully intermarry under the provisions of this act in any place other than the church, chapel, registered building or office or other place specified in the notice and certificate as aforesaid, or without due notice to the superintendent registrar, or without certificate of notice duly issued, or without licence, in case a licence is necessary under this act, or in the absence of a registrar or superintendent registrar when the presence of a registrar or superintendent registrar is necessary under this act, the marriage of such persons except in any case hereinafter excepted, shall be null and void (*i*). After any marriage shall have been solemnized under the authority of any of the recited acts or of this act, it shall not be necessary, in support of such marriage to give any proof of the actual dwelling, or of the period of dwelling, of either of the parties

(*u*) Sect. 9.

(*x*) 6 & 7 Will. IV. c. 85, s. 10.

(*y*) Sect. 15.

(*z*) 3 & 4 Vict. c. 72, s. 12; 19 & 20 Vict. c. 119, s. 13.

(*a*) 6 & 7 Will. IV. c. 85, s. 1.

(*b*) Sect. 20.

(*c*) Sect. 21.

(*d*) 19 & 20 Vict. c. 119, s. 11.

(*e*) 6 & 7 Will. IV. c. 85, ss. 20, 21.

(*f*) Sect. 21.

(*g*) 19 & 20 Vict. c. 119, s. 12.

(*h*) Sect. 19.

(*i*) 6 & 7 Will. IV. c. 85, s. 42.

previous to the marriage within the district stated in any notice of marriage to be that of his or her residence, or of the consent to any marriage having been given by any person whose consent thereto is required by law, or that the registered building in which any marriage may have been solemnized had been certified according to law as a place of religious worship, or that such building was the usual place of worship of either of the parties; nor shall any evidence be given to prove the contrary in any suit or legal proceedings touching the validity of such marriage (*k*).

Quakers and Jews may continue to contract and solemnize marriage according to their usages, and every such marriage is declared and confirmed good in law, provided that both parties are of the persuasion of the society of Quakers or professed Jews, and that notice be given to the superintendent registrar, and his certificate or certificate and licence shall have issued (*l*).

Although the marriages of Quakers and Jews had been expressly exempted from the operation of all the previous marriage acts, and so perhaps recognized as valid, and although proof of Quakers' marriages according to their forms had been received in our courts without objection (*m*), still the decision in *Queen v. Millis* (*n*) rendered doubtful the validity of such marriages contracted before 6 & 7 Will. IV. c. 85, consequently 10 & 11 Vict. c. 18, was passed to declare them valid.

As to the validity of marriage according to the Jewish rites, see the judgment of Sir W. Scott in *Lindo v. Belisario* (*o*).

A Jewess may give parol evidence of her own divorce in a foreign country, according to the ceremony and customs of the Jews there (*p*). In *Moss v. Smith*, 1 Man. & Gr. 232, 3; 1 Scott's N. R. 25, to prove a Jewish divorce in England, it was held necessary, by *Erskine, J.*, that the written document of divorce delivered by the husband to the wife should be produced. According to the evidence of the high priest of the German Jews in England, this document is the operative part of the ceremony, which must, however, take place in the presence of the high priest and ten other persons.

Marriages Abroad.—A soldier on service with the British army in St. Domingo, in 1796, being desirous to marry the widow of another soldier, who had died there in the service, and both parties wishing to celebrate their marriage with effect, they went to a chapel in a town where they were, and there the ceremony

(*k*) 19 & 20 Vict. c. 119, s. 17.

(*l*) 6 & 7 Will IV. c. 85, s. 2; 19 & 20 Vict. c. 119, s. 21; 23 Vict. c. 18, s. 1.

(*m*) *Deane v. Thomas, M. & Malk.* 361; *Tenterden, C.J.*

(*n*) 9 H. of L. 832.

(*o*) 1 Hagg. (C.) 227. See also *Goldsmid v. Bromer*, 1 Hagg. (C.) 324; *Horn v. Noel*, 1 Campb. 61.

(*p*) *Ganer v. Lady Lanesborough*, Peake's N. P. C. 17, Lord Kenyon, C.J.

was performed by a person appearing there as a priest, and officiating as such; the service being in French, but interpreted into English by one who officiated as clerk; and which the woman understood at the time to be the marriage service of the Church of England. After this they cohabited together as man and wife for eleven years, until the death of the husband. On a question as to the settlement of the woman, a doubt was raised whether the marriage was valid. The Court of B. R. (q) were clearly of opinion that it was a valid marriage, whether it was to be considered as a marriage celebrated in a place where the law of England prevailed, or as a marriage according to the law of St. Domingo, whatever that might be. Upon the former ground, inasmuch as there was a contract *per verba de præsenti*, which contracts were binding on the parties before Lord Hardwicke's act, which did not affect the present case, this being a marriage beyond seas, and because the marriage was celebrated by a person who publicly assumed the office of a priest, and appeared habited as such; upon the latter ground, because, upon the facts stated, every presumption must be made in favour of its validity, according to the law of the country where it was celebrated, the marriage ceremony having been performed there in a proper place, and by a person officiating as one competent to perform that function, and more especially as it had been followed by a cohabitation between the parties, as man and wife, for eleven years.

But where A., a domiciled Englishman, and B., both being members of the Church of England, were married at the Consulate Office, at Beyrout in Syria, by an American missionary, not apparently a priest according to the rites of the Church of England, such marriage was held invalid (r).

The canon law is the basis of the matrimonial law of Europe. Before Lord Hardwicke's act, marriages in this country were governed by the king's ecclesiastical law, of which the general canon law was no doubt the basis (s). That statute did not follow British subjects to our foreign settlements; hence it has been held, that a marriage between two British subjects solemnized by a Roman Catholic priest at Madras, according to the rites of the Roman Catholic Church, followed by cohabitation, is valid, although without the licence of the governor, which it had been uniformly the practice to obtain: for that does not alter the law, which the parties carried with them (t).

By stat. Geo. IV. c. 91, s. 1, after reciting, that it is expedient to relieve the minds of his Majesty's subjects from any doubt con-

(q) *R. v. Brampton*, 10 East, 282.

(r) *Catherwood v. Caslon*, 13 M. & W. 261.

(s) See *Queen v. Millis*, opinion of *Tindal*, C.J., where he shows to what extent

the canon law was received into the law of England.

(t) *Larivour v. Teesdale*, 8 Taunt. 830. See *Catherwood v. Caslon*.

cerning the validity of marriages solemnized by a minister of the Church of England in the chapel or house of any British ambassador or minister residing within the country to the court of which he is accredited, or in the chapel belonging to any British factory abroad, or in the house of any British subject residing at such factory, as well as from any possibility of doubt concerning the validity of marriages solemnized within the British lines by any chaplain or officer, or other person officiating under the orders of a commanding officer of a British army serving abroad, it is declared and enacted, "that all such marriages shall be deemed to be as valid in law as if the same had been solemnized within his Majesty's dominions with a due observance of all forms required by law."

The marriage of an officer celebrated by a chaplain of the British army within the lines of the army, when serving abroad, is valid under this statute, though such army is not serving in a country in a state of actual hostility; and though no authority for the marriage was previously obtained from the officer's superior in command (*u*). And this statute gives validity to the marriage of a British subject in the chapel of the British ambassador abroad, whether the other party to the marriage is a British subject or not (*v*).

By the 12 & 13 Vict. c. 68, "An Act for facilitating the Marriage of British Subjects resident in Foreign Countries," marriages (both or one of the parties thereto being subjects or a subject of this realm) may, when the parties have resided for one month within the district of a British consul, be solemnized at the consulate, in the presence of the consul and two witnesses, according to such form and ceremony as the parties may wish to adopt, or they may be solemnized by the consul. The regulations as to notice, certificate, &c., are in the main the same as those contained in the English Registration act, 6 & 7 Will. IV. c. 85, which is incorporated with this act. The act does not affect the validity of any marriage celebrated otherwise than as is therein provided (*x*).

By 28 & 29 Vict. c. 64, s. 1, colonial laws establishing validity of marriages are to have effect throughout her Majesty's dominions.

The result of these statutes and of the general law as affecting the marriages of British subjects abroad would seem to be: that generally the validity of the marriage contract is to be determined by the *lex loci contractus* where there is no incapacity to contract existing in the parties according to the laws of their country (*y*). Therefore, where an Englishman marries abroad, where there is

(*u*) *Walgrave Peerage*, 4 Cl. & Fi. 649.

(*v*) *In re Wright*, 25 L. J., Chanc. 621; *Lloyd v. Petitjean*, 2 Curt. 251.

(*x*) Sects. 1, 9, 21.

(*y*) *Dalrymple v. Dalrymple*, 2 Hagg. Cons. 54; *Brook v. Brook*, 9 H. L. 193; 27 L. J. Ch. 401; *Heseltine v. Murray*, 2 Addam Ecc. Rep. 400.

no embassy, factory, or consulate, the *lex loci* will determine the validity of the marriage (z). If there be an embassy, factory, or consulate, the parties may marry either according to English forms at the embassy, factory, or consulate, or they may marry according to the forms of the country. In the former case the English law would seem to override the *lex loci contractus*, and a marriage good under 12 & 13 Vict. c. 68, would be good, although void by the *lex loci* (a).

All the statutes we have been considering are confined to England, with the exception of Lord Lyndhurst's act, 5 & 6 Will. IV. c. 54, the only reservation in which is that it shall not apply to Scotland. The same law already existed there (b). By the 19 & 20 Vict. c. 96, s. 2, "no irregular marriage contracted in Scotland by declaration, acknowledgment, or ceremony shall be valid, unless one of the parties had at the date thereof his or her usual place of residence there, or had lived in Scotland for twenty-one days next preceding such marriage, any law, custom, or usage notwithstanding." Irish Protestant marriages are regulated by stat. 7 & 8 Vict. c. 81, amended by 9 & 10 Vict. c. 72, and 26 & 27 Vict. c. 90, the provisions of which, ss. 1—9, 23, are similar to those of the English act of Will. IV. Various acts had been passed, affirming marriages by Presbyterian ministers previous to that act—the 5 & 6 Vict. c. 113, &c. By an act of the Irish Parliament, 19 Geo. II. c. 13, s. 1, every marriage, if celebrated by a popish priest, between a Papist and any person that hath been or hath professed himself to be a Protestant at any time within twelve months before such celebration, shall be null and void to all intents. For the law of irregular marriages in Scotland, see *Yelverton v. Yelverton*, 4 Macqueen H. of L. Cases, 743.

Proofs of adultery must in many cases be in some degree presumptive; real and direct proof of the fact is not always to be expected; therefore the question in these cases will be, whether there is evidence of such near, such approximate acts, that there must be a legal presumption of the adultery (c). The confession of the wife is not evidence against the defendant; but conversations between her and the defendant may be given in evidence (d). So letters written to her by the defendant are evidence *against* him; but the wife's letters to the defendant are not evidence *for*

(z) Marriages abroad according to *lex loci* held good here; *Herbert v. Herbert*, 2 Hagg. Cons. 269; *Smith v. Maxwell*, 1 Ry. & M. 80. Foreign marriage not valid according to *lex loci*, held bad here; *Lacon v. Higgin*, 3 Star. 178; *Butler v. Freeman*, Amb. 303; *Kent v. Burgess*, 11 Sim. 361; *Scrimshire v. Scrimshire*, 2 Hagg. Cons. 385. A Mormonite polygamous marriage is not considered a marriage at all in this country. See *Hyde*

v. Hyde, 36 L. J., Mat. 30.

(a) *Este v. Smyth*, 18 Beav. 112.

(b) Paterson, Compendium of English and Scotch Law, s. 868, n. 1.

(c) See *Wood v. Wood*, 4 Hagg. Ecc. R. 138, n.

(d) *Biker v. Morley*, M. D., London Sittings, 30 June, 1741, *Lee*, Ch. J., special jury. Verdict for defendant. Bull, N. P. 28, S. C.

him. In a case where the plaintiff and his wife were servants, and necessarily living apart in different families, Lord *Kenyon*, C.J., was of opinion, that letters written by the wife to her husband, before any suspicion of the adultery, might be read as evidence of the connubial affection which subsisted between the plaintiff and his wife, observing, at the same time, that before he admitted the letters to be read, he should require strict proof when, and under what circumstances, they were written, in order to show that at this time there was not any suspicion of misconduct in the wife(e); and in *Willis v. Bernard*, 8 Bing. 376, a letter of the wife to a third person was admitted, to show the state of the wife's feelings at the time it was written, although it contained a statement of facts, which could not with propriety be submitted as evidence to a jury; on which, however, the judge cautioned the jury, telling them that the letter was not evidence of those facts. In *Winter v. Wroot*, 1 M. & Rob. 404, *Lyndhurst*, C. B., permitted a witness to be asked generally, whether the wife made complaints of the manner in which her husband treated her.

In *Hoare v. Allen* (f), a witness was called by the husband to prove the representation made by the wife to him of the place to which she was going previously to her elopement, in order to remove all suspicion of connivance on the part of the husband. The Court of King's Bench were of opinion that this evidence, being part of the *res gestæ*, was therefore admissible.

III. Of the Damages.—Costs.

The damages given by the jury in the action of crim. con. were, in general, proportioned to the degree of the injury. Circumstances of aggravation of the injury, and which might therefore operate as an inducement with the jury to give large damages, were, the plaintiff's having lived happily with his wife before her connection with the defendant; the unblemished character and antecedent virtuous behaviour of the wife; a provision having been made for the children of the marriage by settlement or otherwise; and other similar topics, which the extraordinary circumstances of the individual case might furnish (g). Proof was frequently adduced of the defendant being a man of fortune, by calling his banker, or producing a settlement, under which he was entitled to any estate real or personal. But in *James v. Biddington*, 6 C. & P. 589, *Alderson*, J., rejected evidence of this description, observing, that the amount of the defendant's property was . .

(e) *Edwards v. Crock*, 4 Esp. N. P. C. 39; *Kenyon*, C.J., *Trelawney v. Coleman*, 1 B. & A. 90, S. P.; and 2 Stark. 191. But in this case the husband and

wife were not servants.

(f) *Hoare v. Allen*, 3 Esp. N. P. C. 276.

(g) Bull. N. P. 27.

not a question in the cause. So *Cresswell*, J., in a case in the Divorce Court, refused to admit such evidence, as it did not appear that the co-respondent had used his fortune as a means of seduction (*h*). And in another case, where evidence had been given that the co-respondent was a partner in a large brewery, the same judge told the jury "that it was not a question what the co-respondent was worth, because if he could not pay in purse he must pay in person; but if a man made use of his wealth in order to corrupt a woman, the jury might conclude that she was not easily corrupted, and therefore of more value to her husband" (*i*).

Circumstances of extenuation, on the part of the defendant, and which might tend to the mitigation of the damages, were the plaintiff's ill usage or unkind treatment of his wife; evidence of his intolerable ill temper, of his having turned his wife out of his house, and refused to maintain her, &c., previously to the adulterous intercourse (*k*); gross negligence or inattention of the plaintiff to his wife's conduct, with respect to the defendant (*l*); the wanton manners of the wife, or first advances made by her to the defendant (*m*); a prior elopement of the wife and adulterous intercourse with another person, or having had a bastard before marriage (*n*); because by bringing this action the husband put the general behaviour of the wife in issue. So letters written by the wife to the defendant before his connection with her, soliciting a criminal intercourse, &c., might be given in evidence (*o*). But the defendant was not permitted to prove acts of misconduct of the wife subsequent to the commission of the act complained of in the action (*p*).

In a case (said to have been unprecedented) where the wife was dead before the trial of the action, *Coleridge*, J., told the jury that they must award damages for the loss of the society of the wife, &c., down to the time of the death only (*q*).

It has been supposed that in this action a new trial could not be granted for excessive damages (*r*); but where it appeared to the court, from the amount of the damages given, as compared with the facts of the case laid before the jury, that the jury must have acted under the influence, either of undue motives or some gross error or misconception on the subject, the question was sub-

(*h*) *Cowing v. Cowing and Ullen*, 33 L. J. Mat. 149.

(*i*) *Foster v. Foster and Berridge*, 11.

(1) to preceding case.

(*k*) Bull. N. P. 27.

(*l*) *Per Buller, J.*, in *Duberley v. Gunning*, 4 T. R. 657.

(*m*) *Per Lord Ellenborough, C.J.*, in *Gardiner v. Jadis*, March 2, 1805, London Sittings.

(*n*) *Roberts v. Malston*, Hereford, 1745, *per Willes, C.J.*, Gilb. Evid. 113, ed. 1731; Bull. N. P. 296, S. C.

(*o*) *Per Lord Kenyon, C.J.*, *Elsam v. Fawcett*, 2 Esp. N. P. C. 562.

(*p*) *Ibid.*

(*q*) *Wilton v. Webster*, M.D., 7 C. & P. 198.

(*r*) See *Wilford v. Berkeley*, 1 Burr. 609; *Duberley v. Gunning*, 4 T. R. 651.

mitted to the consideration of a second jury (*s*). So if the verdict was very much against the weight of evidence, the court would grant a new trial on payment of costs (*t*). With respect to damages, however, the court never interfered, unless they were very excessive, or a strong case was made out to show that the jury had taken a perverted view of the matter (*u*).

Upon a petition containing a claim for damages against the adulterer under the 20 & 21 Vict. c. 85, the court has power to direct in what manner the damages given by the jury shall be paid and applied, and to direct that the whole or any part thereof shall be settled for the benefit of the children (if any) of the marriage, or as a provision for the maintenance of the wife (*x*).

Costs.—By sect. 34 of the 20 & 21 Vict. c. 85, “whenever in any petition presented by a husband the alleged adulterer shall have been made a co-respondent, and the adultery shall have been established, it shall be lawful for the court to order the adulterer to pay the whole or any part of the costs of the proceedings;” and by sect. 51, it is further enacted, that “the court on the hearing of any suit, proceeding or petition under this act, and the House of Lords on any appeal under this act, may make such order as to costs as to such court or to such house respectively may seem just: provided always, that there shall be no appeal on the subject of costs only.”

(*s*) *Chambers v. Carulfield*, 6 East, 256.

(*t*) *Mellin v. Taylor*, 3 Bing. N. C. 109; 8 Sc. 513.

(*u*) *Per Tindal, C.J., Edgell v. Francis*,

1 Man. & Gr. 225; 1 Scott, N. R. 118. N.—The action was for false imprisonment.

(*x*) Sect. 33, *ante*, p. 8.

CHAPTER III.

AMENDMENT UNDER THE COMMON LAW PROCEDURE ACTS.

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FORMERLY amendments could only be made at chambers, but the 9 Geo. IV. c. 15, empowered the judge at the trial to amend in the case of a variance "between any matter in writing or in print produced in evidence, and the recital or setting forth thereof upon the record." This power was extended by the 3 & 4 Will. IV. c. 43, s. 23, enabling him (a) to amend "when any variance shall appear between the proof and the recital, or setting forth on the record, &c., of any contract, custom, prescription, name, or other matter in any particular or particulars in the judgment of such court or judge, not material to the merits of the case, and by which the opposite party could not have been prejudiced in the conduct of his action, prosecution, or defence." The 24th section enacts, "that the court or judge shall and may, if he or they think fit, in all such cases of variance, instead of causing the record or document to be amended, direct the jury to find the facts according to the evidence, and thereupon such finding shall be stated in such record or document, and notwithstanding the finding on the issue joined, the court . . . shall, if they think the variance immaterial to the merits of the case, and the misstatement such as could not have prejudiced the opposite party in the conduct of the action or defence, give judgment according to the very right and justice of

(a) By the 18th sect. the like powers of amendment are given to the sheriff or his deputy or judge, at the trial of an issue.

the case" (b). These enactments are not repealed, although they are almost entirely superseded by the Common Law Procedure Acts of 1852, 1854, and 1860.

I. *The 15 & 16 Vict. c. 76, s. 222, the 17 & 18 Vict. c. 125, s. 96, and the 23 & 24 Vict. c. 126, s. 36.*

By the 222d section of the Common Law Procedure Act, 1852 (c), after reciting that the power of amendment then vested in the courts and the judges thereof was insufficient to enable them to prevent the failure of justice by reason of mistakes and objections of form, it is enacted, that "it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceeding in civil causes, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining, *in the existing suit*, the real question in controversy between the parties shall be so made."

By the Common Law Procedure Act, 1854 (d), it is enacted, that "it shall be lawful for the superior courts of common law, and every judge thereof, and any judge sitting at Nisi Prius, at all times to amend all defects and errors in any proceedings under the provisions of this act, whether there is anything in writing to amend by or not, and whether the defect or error be that of the party applying to amend or not; and all such amendments may be made with or without costs, and upon such terms as to the court or judge may seem fit; and all such amendments as may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties shall be so made, *if duly applied for*." The 36th section of the Common Law Procedure Act of 1860 is in the same words.

These enactments, it will be observed, are in substance the same, the only difference being that the latter of them is unclogged by the preamble as to "objections of form" in the former (e), and introduces the words "if duly applied for." The 69th section of the Common Law Procedure Act, 1854, also appears to be treated by the courts as applicable to all proceedings in civil cases, notwithstanding that the section in terms applies only to proceedings under that act (f). "I think," says Mr. Baron Parke, "we ought

(b) The cases on this statute will be found in the notes to Chitty Statutes, tit. Amendment.

(c) 15 & 16 Vict. c. 76.

(d) 17 & 18 Vict. c. 125, s. 96.

(e) See *May v. Footner*, 5 E. & B. 506.

(f) *Ibid.*; and *Brennan v. Howard*,

to extend the power of amendment as far as we reasonably can, in order to prevent the parties from being tripped up by technical objections" (g). The object of any proposed amendment must be to determine, *in the existing suit*, the real question in controversy between the parties. This provision, in the earlier stages of the action, would probably scarcely ever, according to the practice, preclude an amendment. In respect to amendments at the trial, however, "it was intended to limit the power of amendment to the introduction of matters which the parties hoped and intended to try in the cause, and not to authorise amendments which might raise questions which never were contemplated before" (h). And it is for the judge at the trial, looking at the record and the evidence, to decide what is the real question in controversy between the parties (i). But a writ issued under the Bills of Exchange Act may be amended so as to appear as an ordinary writ specially indorsed, since the real question to be decided is, whether or not the plaintiff is entitled to recover against the defendant the amount of the bill (k).

It is no objection to the allowance of an amendment that it takes away a right of action or defence which should otherwise be vested in the opposite party (l).

II. Amendments, by whom to be made.

The Act of Parliament includes the superior courts and the judges thereof, or any judge sitting at Nisi Prius; but does not extend to the sheriff or other person presiding at the trial of a cause under a writ of trial (m). Whether or not an arbitrator has power to amend under an order of reference at or before trial, will depend upon the terms of the reference. When a reference was "by consent, order upon the usual terms," it was held that he had such power (n).

III. Amendments, when and how to be made.

Amendments may be made *at all times* (o). Thus amendments may be made in the writ (p) or other proceeding before trial, or at

1 H. & N. 138. See, however, *Leigh v. Baker*, 2 C. B., N. S. 376.

(g) In *Wilkinson v. Sharland*, 11 Exch. 36.

(h) *Per Maule, J.*, in *Wilkin v. Reed*, 15 C. B. 192.

(i) *Wilkin v. Reed*, 15 C. B. 192; *Webster v. Emery*, 10 Exch. 907.

(k) *Leigh v. Baker*, 2 C. B., N. S. 367; *Knight v. Pocock*, 17 C. B. 177.

(l) See *pér Erle, J.*, in *Cornish v.*

Hockin, 1 E. & B. 602.

(m) *Wickes v. Grove*, 2 Jur., N. S. 212.

(n) *Thompson v. Bowyer*, 9 C. B., N. S. 285.

(o) 15 & 16 Vict. c. 76; 17 & 18 Vict. c. 125, s. 96.

(p) *Knight v. Pocock*, 17 C. B. 177; *Leigh v. Baker*, 2 C. B., N. S. 367; *Cornish v. Hockin*, 1 E. & B. 602; and see *Gibson v. Varley*, 7 E. & B. 49.

the trial, or by the court in banc after the trial (*q*), or even after judgment and commencement of proceedings in error (*r*). In the latter case, if the application is made before the day of sitting of the court of error, it must be made to the court below, since the record is not removed into the court of error until that day (*s*). The particulars of demand may be amended, and that after the cause has been referred compulsorily under the Common Law Procedure Act, 1854 (*t*): there would, however, be a difficulty in amending them at the trial.

It is not quite clear how far the court in banc has power to review the decision as to amendments of a single judge sitting at chambers or at Nisi Prius (*u*). Although the judges have held different opinions upon the point, perhaps that of *Pollock*, C.B., may be considered the soundest: "We (the court) have of necessity a power to review every such decision, and to do whatever is necessary to ensure substantial justice, and for that purpose we *might* interfere in many cases where we do not ordinarily interfere, but I think it is for the judge to exercise his discretion, and as a general rule we *ought* not to interfere" (*v*). Perhaps it may be laid down as a rule that a court will not interfere with the discretion of the judge at the trial, unless it appear affirmatively that injustice has in fact been worked thereby (*x*). A court of error will not on demurrer inquire into the propriety of an amendment stated in the pleadings to have been allowed by a judge, and which the judge had jurisdiction to make (*y*). The judge frequently allows an amendment, subject to the opinion of the court as to its propriety (*z*). In an action for falsely representing the receipts of a public-house, the declaration alleged the agreement of purchase to be for "goodwill, furniture, fixtures, &c.," whereas the word "goodwill" was not in it, and the judge nonsuited, giving leave to enter a verdict, but refused to make an amendment, or to reserve leave to amend, *Erle*, C.J., after argument of a rule *nisi* for entering the verdict, first stating his impression that an amendment was not needed, added, "the case is one in which the court has power to amend, and in which it ought, if it were necessary, to exercise it," and the rest of the court concurred (*a*).

An omission in a writ of summons or copy, whether under the Bills of Exchange Act or otherwise, may be amended upon a motion

(*q*) *Edwards v. Hodges*, 15 C. B. 477; *Parsons v. Alexander*, 5 E. & B. 263.

(*r*) *Wilkinson v. Sharland*, 11 Exch. 33. The amendment was the introduction of the words "for money payable," &c., at the commencement of the money counts. *Hooper v. Lane*, 3 Jur., N. S. 1026.

(*s*) *Wilkinson v. Sharland*, *supra*.

(*t*) *Gibbs v. Knightly*, 2 H. & N. 34; and see *Cannon v. Reynolds*, 5 E. & B. 301; *Emery v. Webster*, 9 Exch. 242; 10 Exch. 901, S. C.; 2 Arch. Pr. 1362.

(*u*) *Wilkin v. Reed*, 15 C. B. 192;

Morgan v. Pike, 14 C. B. 483. See, however, *Brennan v. Howard*, 1 H. & N. 138.

(*v*) *Brennan v. Howard*, 1 H. & N. 138. See, for other opinions, *Wilkin v. Reed*, 15 C. B. 192; *Morgan v. Pike*, 14 C. B. 483; *Holden v. Ballantyne*, 29 L. J. 149.

(*x*) *Tennyson v. O'Brien*, 5 E. & B. 501.

(*y*) *Webster v. Emery*, 10 Exch. 901.

(*z*) *May v. Footner*, 5 E. & B. 505.

(*a*) *Cater v. Wood*, 19 C. B., N. S. 286.

to set aside the writ or copy and service (b). And also a writ issued in one of the forms given by the Common Law Procedure Act, 1852, by mistake for another of them, may be amended on an *ex parte* application without costs (c).

IV. *What Amendments allowed.*

Writs of summons are, as above observed (d), in general amendable; there is no power, however, to amend by ante-dating a writ for the purpose of saving the Statute of Limitations, since the fifth section of the Common Law Procedure Act provides, that the "writ shall bear date on the day on which the same shall be issued" (e).^{*} Amendments by adding counts are usually made on terms if applied for a sufficient time before trial as a matter of course (f). And the judge has the power to add a count at the trial, provided the subject matter of the proposed count has been sufficiently in dispute between the parties in the suit (g). Thus, in an action for inducing the plaintiff, a surgeon, to attend a case of accident by falsely representing that the defendant was authorised by a railway company to employ him, a count for work and labour was added at the trial, the defendant being at liberty to plead payment into court to the added count (h). In an action for an excessive distress, the declaration not averring that the whole sum distrained for was not due, with a count for selling before the expiration of the five days, an application to amend by adding a count for distraining and selling goods to satisfy more rent than was due, was held to have been properly refused at the trial, on the ground that it was not a matter in dispute in the action (i). In respect to adding pleas, a similar rule prevails (k), subject to the observation that it is not *imperative* on the court to allow a substituted plea even before trial, and such substituted plea will not be allowed where it is sought to place a new and improper defence on the record. Thus, after issue joined on a plea of never indebted to a declaration for money lent, the court refused the defendant leave to substitute a plea that the money was lent for the purpose of purchasing shares in a foreign lottery, and reselling them in England (l). So in an action on a contract to smuggle goods to New York, an amendment was refused at the trial, because the court declined to assist

(b) *Knight v. Pocock*, 17 C. B. 177; *Leigh v. Baker*, 2 C. B., N. S. 367; 15 & 16 Vict. c. 76, s. 20.

(c) 15 & 16 Vict. c. 76, s. 21. See *Green v. Braddyl*, 1 H. & N. 69.

(d) *Ibid.*

(e) *Clarke v. Smith*, 2 H. & N. 753. As to amendments to save the Statute of Limitations, see further *Cornish v. Hockin*, 1 E. & B. 602; *Cowburn v. Wearing*, 9 Exch. 207; *Crawford v. Cocks*, 6 Exch.

287; 1 Arch. Pr. 186.

(f) See Arch. Pr. 209.

(g) *Taylor v. Shaw*, 1 C. L. R. 1057; *Robson v. Turnbull*, 1 F. & F. 365; *Wickes v. Grove*, 2 Jur., N. S. 212; *Morgan v. Pike*, 14 C. B. 473.

(h) *Robson v. Turnbull*, 1 F. & F. 365.

(i) *Lucas v. Tarleton*, 3 H. & N. 116.

(k) See *Edwards v. Hodges*, 15 C. B. 477; *Adams v. Smith*, 1 F. & F. 311.

(l) *Ritchie v. Van Gelder*, 9 Exch. 762.

the plaintiff to enforce a contract to defraud a foreign government (*m*). There is a difference of opinion, however, amongst the judges as to whether the nature of the action or defence ought to be looked to in determining whether an amendment should be allowed (*n*). Case for negligent driving, pleas, not guilty and not possessed; at the trial, *Jervis*, C.J., allowed a plea that the cart and horse were not being used in the plaintiff's employ at the time of the occurrence to be added; but the point was not decided by the court in banc because the defence was admissible already, under not guilty (*o*). The omission of a statute from the margin, a plea of "not guilty by statute," may be amended at or after the trial (*p*).

The following examples will show the sort of amendments that may be made and the terms imposed. In a declaration for not accepting a cargo contracted to be delivered at a given time, averring readiness to deliver accordingly, an amendment by averring that the shipment was delayed at the defendant's request, and that the plaintiff was exonerated from delivering until a later day, was allowed at the trial, and it was held that the judge properly refused to postpone the trial, no injustice being suggested to have been done to the defendant by such refusal (*q*). In an action for slander, an amendment averring that the words were spoken of the plaintiff in the way of his trade, was allowed (*r*). In an action of libel, on its appearing that the substance only of the libel was stated, the declaration was amended at the trial by inserting the libel as proved, with the words "meaning thereby" immediately before the libel charged in the declaration, and the judge offered to postpone the trial (*s*). In an action for obstruction to a water-course, where the evidence proved a narrower right than that declared upon and exercised in fact, the right having been traversed, an amendment according to the restricted right proved was refused (*t*). In an action for giving to the plaintiff a false character of a clerk, however, by saying that he had been dismissed on account of a decrease in the defendant's business, "when in truth he had *been dismissed* for dishonesty," an amendment to substitute an averment that he had, whilst in the service, *been guilty* of dishonesty, was refused at the trial (*u*). In an action for dismissing a commercial traveller, the declaration stated a yearly service, the evidence showed an usage in the trade for dismissal on three months' notice; the court considered that an amendment should have been allowed without costs (*x*). To a declaration for dismiss-

(*m*) *Brennan v. Howard*, 1 H. & N. 497.
138.

(*n*) *Per Crowder, J.*, in *Holmes v. Bury*, 1 F. & F. 374.

(*o*) *Mitchell v. Crassweller*, 13 C. B. 237.

(*p*) *Edwards v. Hodges*, 15 C. B. 477.

(*q*) *Tennyson v. O'Brien*, 5 E. & B.

(*r*) *Ramsdale v. Greenacre*, 1 F. & F. 61.

(*s*) *Saunders v. Bate*, 1 H. & N. 402.

(*t*) *Cawkwell v. Russell*, 26 L. J., Exch. 34.

(*u*) *Wilkin v. Reed*, 15 C. B. 192.

(*x*) *Metzner v. Bolton*, 23 L. J., Exch.

ing the plaintiff from his engagement as an actor, the defendant pleaded payment into court of 32*l.*, which the plaintiff, under a mistaken notion that the declaration entitled him to recover that sum only, took out in satisfaction, and the costs were taxed and paid by the defendant. Mr. Baron *Parke* afterwards, on the plaintiff's application, made an order that the replication and subsequent proceedings should be set aside, on payment of costs and repayment of the 32*l.* paid into court, and the costs paid by the defendant; the plaintiff to be at liberty to amend his declaration and particulars of demand, and the defendant to plead *de novo* (y). In trover, an amendment to substitute a count in *assumpsit* for non-delivery of the goods, was, under particular circumstances, refused (z). Trespass, *q. c. f.*; pleas (*inter alia*) that the close was not the plaintiff's, and *liberum tenementum*. On the trial it appeared that the real question in controversy was, whether the soil in a lane passing between a field of the plaintiff's and a field of the defendant's was the freehold of one or the other. The evidence showed that the plaintiff's field was in the occupation of a tenant. Held, that an amendment of the count into one for injury to the plaintiff's reversion was properly made by the judge at the trial (a). But in a declaration for false imprisonment on a charge of felony, an amendment substituting a charge of assault was refused (b). Upon a trial by the record, the court will amend a variance in the declaration in the date (c) or amount (d) of the judgment recovered. Where, in an action on a bill of exchange, it appeared that the bill was accepted by defendant's partner in the name of the firm, and included a private debt due from the partner as well as a debt due from the firm, the court amended the declaration by adding a count for the consideration, so that a verdict could be entered for the sum really due from the firm (e).

No amendment which would afford reasonable ground for a demurrer ought to be made at the trial (f). An objection, however, that the amendment has made the plea defective in point of form, must be taken, if at all, at the time it is applied for (g). The judge at Nisi Prius may make successive amendments, or rescind amendments in order to meet successive objections (h).

Although the court has power to amend a special case when the amendment is clearly necessary to raise the substantial question which the parties intended to raise, yet the court has no power,

130. As to costs in such case further, *Buckland v. Johnson*, 23 L. J., C. P. 204.

(y) *Webster v. Emery*, 10 Exch. 901; *Emery v. Webster*, 9 Exch. 242.

(z) *Unwin v. Adams*, 1 F. & F. 312.

(a) *May v. Footner*, 5 E. & B. 505; and see *Adams v. Smith*, 1 F. & F. 311.

(b) *Rowe v. Hawkins*, 1 F. & F. 91.

(c) *Noble v. Chapman*, 14 C. B. 400.

(d) *Hunter v. Emmanuel*, 15 C. B. 290.

(e) *Ellston v. Deacon*, 2 L. R. 20, C. P.

(f) *Martyn v. Williams*, 1 H. & N. 817; *Hughes v. Bury*, 1 F. & F. 374.

(g) *Buckland v. Johnson*, 14 L. J., C. P. 204.

(h) *Morgan v. Pike*, 14 C. B. 473.

without the consent of both parties, to vary a special, for the purpose of raising a different, question (*i*).

A rule of court, although made absolute, may, under special circumstances, be amended (*k*).

V. Amendment in case of Nonjoinder or Misjoinder.

The 222nd section of the act (*l*) does not apply to a case of misjoinder or nonjoinder of parties (*m*), such cases being provided for by ss. 34—39. In a case of ejectment by mortgagee of devisee against heir at law, it appearing at the trial that the devisee was a *cestui que trust*, an amendment was made by adding the names of the trustees as plaintiffs, with their consent, and the court held that, although section 35 might not apply to ejectment, the judge had power to make the amendment under section 222 (*n*); but it would seem, however, that this case is of very doubtful authority (*o*). When a foreign bank sued in a corporate name by which it was known, and the defendant pleaded that it was not a body corporate, the court allowed the writ and all subsequent proceedings to be amended under section 222, upon the payment of costs, by inserting the name of a director as nominal plaintiff; but this was not adding a new plaintiff, but rather correcting a mistake in the name of the plaintiff (*p*). Much less has a judge or the court any power to amend at the trial, or at any other time, under any section, by adding a defendant, except after a plea in abatement (*s*. 38). Thus where, in an action against a husband, it appeared that the goods had been sold to the wife *dum sola*, it was held that the judge had no power to amend by making the wife a co-defendant (*q*). A wrong person having been sued, the judge at the trial amended by substituting the name of the person really intended to be sued for that of the defendant on the record, and directed a verdict to be entered against him, "sued as," &c., and the court refused to order a verdict to be entered for the defendant named originally on the record for the purpose of enabling him to get costs, there being suspicion of collusion (*r*).

There is no power to amend by substituting one plaintiff for another, under any section. Thus where an action is commenced

(*i*) *Mersey Docks v. Jones*, 8 C. B., N. S. 124; *Notman v. Anchor Insurance Co.*, 6 C. B., N. S. 536.

(*k*) *Siller v. Holman*, 14 C. B., N. S. 336.

(*l*) See *ante*, p. 30.

(*m*) *Wickens v. Steel*, 2 C. B., N. S. 488; 26 L. J., C. P. 241, *S. C.*; *Robson v. Doyle*, 3 E. & B. 396.

(*n*) *Blake v. Done*, 7 H. & N. 465.

(*o*) *Garrard v. Guibilei*, 13 C. B., N. S. 837. Blackburn, J.

(*p*) *La Banca Nazionale Sede di Torino v. Hamburger*, 2 H. & C. 330.

(*q*) *Garrard v. Guibilei*.

(*r*) *Podmore v. Schmidt*, 17 C. B., N. S. 725.

in the name of a dead man, his representatives cannot be substituted as plaintiffs (s).

By the Common Law Procedure Act, 1852, s. 34, "it shall and may be lawful for the court, or a judge, at any time before the trial of any cause, to order that any person or persons, not joined as plaintiff or plaintiffs in such cause, shall be so joined; or that any person or persons, originally joined as plaintiff or plaintiffs, shall be struck out from such cause, if it shall appear to such court or judge that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid consent, either in person or by writing under his, her, or their hands, to be so joined, or that the person or persons to be struck out as aforesaid, were originally introduced without his, her, or their consent, or that such person or persons consent in manner aforesaid to be so struck out; and such amendment shall be made upon such terms as to the amendment of the pleadings (if any), postponement of the trial, and otherwise, as the court or judge, by whom such amendment is made, shall think proper (t); and when any such amendment shall have been made, the liability of any person or persons who shall have been added as co-plaintiff or co-plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such cause."

By sect. 35,—“In case it shall appear at the trial of any action, that there has been a misjoinder of plaintiffs, or that some person or persons, not joined as plaintiff or plaintiffs, ought to have been so joined, and the defendant shall not, at or before the time of pleading have given notice in writing that he objects to such nonjoinder, specifying therein the name or names of such person or persons, such misjoinder or nonjoinder may be amended, as a variance at the trial by any court of record holding plea in civil actions, and by any judge sitting at *Nisi Prius*, or other presiding officer in like manner as to the mode of amendment, and proceedings consequent thereon, or as near thereto as the circumstances of the case will admit, as in the case of amendments of variances under 3 & 4 Will. IV. c. 42, if it shall appear to such court or judge or other presiding officer, that such misjoinder or nonjoinder was not for the purpose of obtaining an undue advantage, and that injustice will not be done by such amendment, and that the person or persons to be added as aforesaid consent, either in person or by writing under his, her, or their hands, to be so joined, or that the person or persons to be struck out as aforesaid, were originally introduced without his, her, or their consent, or that such person or persons consent, in manner aforesaid, to be so struck out, and such amendment shall be made upon such terms as the court, or judge,

(s) *Clay v. Oxford*, 2 L. R. 54 Exch.

(t) See *Williams v. Groves*, 1 F. & F. 341.

or other presiding officer, by whom such amendment is made, shall think proper; and when any such amendment shall have been made, the liability of any person or persons, who shall have been added as co-plaintiff or co-plaintiffs, shall, subject to any terms imposed as aforesaid, be the same as if such person or persons had been originally joined in such action."

By sect. 36,—“In case such notice be given, or any plea in abatement of nonjoinder of a person or persons as co-plaintiff or co-plaintiffs, in cases where such plea in abatement may be pleaded, be pleaded by the defendant, the plaintiff shall be at liberty, without any order to amend the writ and other proceedings before plea, by adding the name or names of the person or persons named in such notice or plea in abatement, and to proceed in the action without any further appearance, on payment of the costs of, and occasioned by such amendment only, and in such case the defendant shall be at liberty to plead *de novo*."

By sect. 37,—“It shall and may be lawful for the court, or a judge in the case of the joinder of too many defendants in any action on contract, at any time before the trial of such cause, to order that the name or names of one or more of such defendants be struck out, if it shall appear to such court or judge that injustice will not be done by such amendment; and the amendment shall be made upon such terms as the court or judge by whom such amendment is made shall think proper; and in case it shall appear at the trial of any action or contract that there has been a misjoinder of defendants, such misjoinder may be amended, as a variance at the trial, in like manner as the misjoinder of plaintiffs has been hereinbefore directed to be amended, and upon such terms as the court, or judge, or other presiding officer, by whom such amendment is made, shall think proper."

Where, in an action of contract, one of several defendants appears at the trial not to be liable, the proper course for the plaintiff is to apply at the trial for an amendment under the 37th section above mentioned; and the misjoinder cannot be amended after the trial by the court in banc under sect. 222 (*u*). The fact of one of several defendants in an action of contract having suffered judgment by default will not preclude an amendment under the 37th section by striking out the name, either of another of the defendants (*x*), or of the defendant who has so suffered judgment by default (*y*). The 37th section does not apply to a case where the party whose name is sought to be expunged has been joined, not by mistake or inadvertence, but designedly, for the purpose of fixing him with liability: therefore, where the

(*u*) *Robson v. Doyle*, 3 E. & B. 396; *Wickens v. Steel*, 2 C. B., N. S. 488.

(*x*) *Johnson v. Goslett*, 18 C. B. 728.

(*y*) *Greaves v. Humphries*, 4 E. & B.

851; see, however, the remark on this case of *Byles*, Serjt., in *Johnson v. Goslett*, *supra*, 18 C. B. 742.

plaintiff's counsel goes to the jury with a view of obtaining a verdict against all the defendants, and fails as against one, the case is not one in which he has a right to ask for the exercise of the judge's discretionary power in his favour (z). And after the verdict has been returned, an application to amend is clearly too late, even though made before the entry of the verdict (a).

By sect. 38,—“ In an action on contract where the nonjoinder of any person or persons as a co-defendant or co-defendants has been pleaded in abatement, the plaintiff shall be at liberty, without any order, to amend the writ of summons and the declaration by adding the name or names of the person or persons so named in such plea in abatement as joint contractors, and to serve the amended writ upon the person or persons so named in such plea in abatement, and to proceed against the original defendant or defendants, and the person or persons so named in such plea in abatement: provided that the date of such amendment shall, as between the person or persons so named in such plea in abatement and the plaintiff, be considered for all purposes as the commencement of the action.”

By sect. 39,—“ In all cases after such plea in abatement and amendment, if it shall appear upon the trial of the action that the person or persons so named in such plea in abatement was or were jointly liable with the original defendant or defendants, the original defendant or defendants shall be entitled as against the plaintiff to the costs of such plea in abatement and amendment; but if at such trial it shall appear that the original defendant or any of the original defendants is or are liable, but that one or more of the persons named in such plea in abatement is or are not liable as a contracting party or parties, the plaintiff shall nevertheless be entitled to judgment against the other defendant or defendants who shall appear to be liable; and every defendant who is not so liable shall have judgment, and shall be entitled to his costs as against the plaintiff, who shall be allowed the same, together with the costs of the plea in abatement and amendment, as costs in the cause against the original defendant or defendants who shall have so pleaded in abatement the nonjoinder of such person: provided that any such defendant who shall have so pleaded in abatement shall be at liberty on the trial to adduce evidence of the liability of the defendants named by him in such plea in abatement.”

The misjoinder of plaintiffs which unless amended was a fatal defeat, is now no longer so, as by the Common Law Procedure Act, 1860 (23 & 24 Vict. c. 126, s. 19), it is enacted that, “ The joinder of too many plaintiffs shall not be fatal, but every action may be

(z) *Wickens v. Steel*, 2 C. B., N. S. 488.

(a) *Ibid.* As to the terms on which

such amendments will be made, see *Cooper v. Saunders*, 1 F. & F. 13.

brought in the name of all the persons in whom the legal right may be supposed to exist ; and judgment may be given in favour of the plaintiffs by whom the action is brought, or of one or more of them, or in case of any question of misjoinder being raised, then in favour of such one or more of them as shall be adjudged by the court to be entitled to recover : provided always, that the defendant, though unsuccessful, shall be entitled to his costs occasioned by joining any person or persons in whose favour judgment is not given unless otherwise ordered by a court or a judge."

CHAPTER III.

OF ASSAULT AND BATTERY.

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I. *Of the Nature of an Assault and Battery, and in what Cases an Action may be maintained.*

AN *assault* is an attempt, with force or violence, to do a corporal injury to another against his will (*a*), as by holding up a fist in a menacing manner (*b*); striking at another with a cane or stick, though the party striking misses his aim; drawing a sword or bayonet; throwing a bottle or glass with intent to wound or strike; presenting a gun at a person who is within the distance to which the gun will carry; pointing a pitchfork at a person who is within reach (*c*); or by any other similar act, accompanied with such circumstances as denote at the time an intention (*d*), coupled with a present ability (*e*), of using actual violence against the person of another, as by defendant and his servants surrounding the plaintiff, tucking up their sleeves and threatening to break his neck if he did not leave their shop (*f*). For an assault which is

(*a*) *Christopherson v. Bare*, 11 Q. B. 473; 17 L. J., Q. B. 109.

(*b*) *Finch's Law*, Bk. 3, c. 9; 1 Hawk. P. C. c. 62, s. 1.

(*c*) *Genner v. Sparks*, 6 Mod. 173, 174, and Salk. 79.

(*d*) *Alderson v. Waistell*, 1 C. & K.

358, *per Rolfe*, B.

(*e*) See *Stephens v. Myers*, 4 C. & P. 349, *Tindal*, C.J.,; *R. v. St. George*, 9 C. & P. 492.

(*f*) *Read v. Coker*, 13 C. B. 850; 22 L. J., C. P. 201.

considered as an inchoate violence the law has provided a remedy by an action of trespass at the suit of the injured party for the recovery of damages commensurate to the injury sustained. Whether the act shall amount to an assault must in every case be collected from the intention. Trespass for assault: Plea, *son assault demesne*. Replication, *de injuriâ*. The defendant and another person were fighting, and the plaintiff came and took hold of the defendant by the collar, in order to separate the combatants, whereupon the defendant beat the plaintiff. The plaintiff's counsel offering to enter into this evidence, it was objected on the other side that the plaintiff ought to have replied this matter specially; but *Legge*, Baron, overruled the objection, observing that the evidence was not offered by way of justification, but for the purpose of showing that there was not any assault, for it was the *quo animo* which constituted an assault, which was matter to be left to a jury (*g*). "No words can amount to an assault, though, perhaps, they may in some cases serve to explain a doubtful action; as if a man were to lay his hand upon his sword, and say, 'If it were not assize time, he would not take such language.' These words would prevent the action from being construed an assault, because they show he had no intent to do him any corporal hurt at that time" (*h*). Where a policeman obstructs a person entering a room, remaining passive and merely opposing his body as any inanimate object to the entrance of the person into the room, this is not an assault (*i*). Where there has been criminal intercourse, accompanied in the first instance with some degree of violence, an action is maintainable for the assault (*k*). In an action by a woman for assault on her, stating that the assault was followed by a rape and that she had not prosecuted the defendant, the judge nonsuited her (*l*).

A *battery*, which always includes an assault (*m*), is an injury inflicted on a person by beating, either with the hand or an instrument, or by any substance put or continued in motion by him (*n*); by throwing water even (*o*). If A. beats the horse of B., whereby he runs against C., A. is the trespasser and not B. So if A. takes the hand of B., and with it strikes C., A. is the trespasser and not B. (*p*). The form of action in the case of battery is the

(*g*) *Griffin v. Parsons*, Gloucester Lent Assizes, 1754, MS., cited *arg.* in *Hall v. Fearnly*, 3 Q. B. 920.

(*h*) Bull, N. P. 15.

(*i*) *Jones v. Wylie*, 1 C. & K. 257, *per Denman*, C.J.

(*k*) *Desborough v. Homes*, 1 Fost. & Finl. 6. For the law relating to indictments for assault and battery, see 1 Hawk. P. C. ch. 62, ss. 1, 2; 1 East's P. C., ch. 8, s. 1. The party injured may proceed by action and indictment for the same assault, and the court in

which the action is brought will not compel the plaintiff to make his election to pursue either one or the other. *Jones v. Clay*, 1 B. & P. 191. See 9 Geo. IV. c. 31, *infra*.

(*l*) *Wellock v. Constantine*, 32 L. J., Ex. 285.

(*m*) *Termes de la Ley*, Battery; Com. Dig. Battery.

(*n*) *Rawlins v. Till*, 3 M. & W. 28; 6 Dowl. 159, S. C.

(*o*) *Pursell v. Horn*, 8 A. & E. 602.

(*p*) *Per cur. Gibbons v. Pepper*, Salk.

same as that in assault, *viz.*, an action of trespass. In order to maintain this action, it is immaterial whether the act of the defendant be wilful or not. Neither does the degree of violence with which the act is done make any difference (*q*). Hence this action lies against a soldier who hurts his comrade while they are exercising, unless the defendant can show such circumstances as will make it appear to the court that the injury done to the plaintiff was *inevitable* (*r*), and that the defendant was not chargeable with any negligence: the merely pleading that the defendant committed the injury *casualiter et per infortunium et contra voluntatem suam* is not sufficient, for no man shall be excused of a trespass unless it may be judged utterly without his fault. The defendant was uncocking a gun, and the plaintiff standing to see it, it went off, and wounded him: it was held that the plaintiff might maintain trespass (*s*).

This action lies not only against him who commits the injury, but against him also at whose command it is done (*t*), and whether that command is directed against a particular person by name, or by an illegal order against a class of persons of whom the plaintiff is one (*u*). It lies against a corporation for the acts of their servants, even without a previous command, provided the act of the servant might have been for the company's benefit and they have ratified it, which they may do without an instrument under seal (*x*). And the same law of ratification holds with regard to individuals, provided the party actually committing the assault, &c., holds himself out as acting for the defendant (*y*). Where the defendant hired a carriage and horses, and the horses were driven by postilions, servants of the owner of the horses, the defendant sitting on the box, and the defendant at the time of the accident and subsequently held himself out as responsible, and used expressions showing that he had a control over the postilions at the time it happened, he was held liable in trespass to the plaintiff, whose gig had been overturned by the carriage (*z*). But a person who requests another, his servant in that behalf, to remove one making a disturbance from his house, is not responsible for excess of force or violence in carrying out his command, although perhaps he may be accountable for a negligent performance of his orders (*a*).

638; Lord Raym. 39; and see *Gilbertson v. Richardson*, 5 C. B. 502; 17 L. J., C. P. 112.

(*q*) *Per Le Blanc, J.*, 3 East, 602.

(*r*) *Weaver v. Ward*, Hob. 134.

(*s*) *Underwood v. Hewson*, Str. 396.

(*t*) 1 Roll. Abr. 555, (V.), pl. 2.

(*u*) *Cobbett v. Grey*, (Secretary of State) 4 Exch. 729; 19 L. J., Exch. 137; and see *Glynn v. Houston* (Lieutenant-Governor of Gibraltar), 2 M. & G. 337.

(*x*) *Eastern Counties Railway Company v. Broom*, 6 Exch. 314; 20 L. J. 196 (Exch.); and see *Sharrod v. London and North-Western Railway Company*, 7 D. & L. 213; 4 Exch. 580.

(*y*) *Wilson v. Trummon*, 1 D. & L. 513; 12 L. J., C. P. 306.

(*z*) *M'Laughlin v. Prior*, 4 M. & G. 48.

(*a*) *Pidgeon v. Legge*, 5 Weekly Rep. 649. See also *Greenwood v. Seymour*, 30 L. J. 327, Ex.

Although the plaintiff declares for an assault and battery, yet he may recover for the assault only (*b*). Although a party has been indicted for a felonious assault by stabbing, and *acquitted*, the party injured may, notwithstanding, sue him for damages in a civil action, if there has not been any collusion by the plaintiff in procuring his acquittal; and the same rule holds after indictment and *conviction* (*c*).

By 9 Geo. IV. c. 31, s. 27, persons convicted of unlawfully assaulting or beating, may be compelled, by two justices of the peace, to pay a fine and costs, not exceeding 5*l.*; but if the justices shall deem the offence not to be proved, or shall find the assault or battery to have been justified, or so trifling as not to merit any punishment, and shall accordingly dismiss the complaint, they shall *forthwith* (*d*) make out a certificate under their hands, stating the fact of such dismissal; and by sect. 28, such certificate, or in case of conviction payment of the whole amount adjudged, or suffering imprisonment in lieu thereof, shall be a bar to any other proceeding, *civil* or criminal, for the same cause.—Where a complainant, having summoned a party for an assault, declined (on the party summoned pleading not guilty) to proceed, stating that he meant to bring an action, and the justices thereupon dismissed the complaint and gave the defendant a certificate as follows, “We deemed the offence not proved, inasmuch as the complainant did not offer any evidence in support of the information, and have accordingly dismissed the complaint;” this certificate was held to be a bar to an action for the same assault, under the above section (*e*). So where after information and summons the complainant gave notice to the defendant not to attend, and to the magistrate’s clerk that he should not attend, but the defendant attended, and claimed to have the information dismissed and a certificate granted under the statute, it was held in an action that the magistrates were warranted in granting the certificate, and that it was a bar (*f*). Application for this certificate ought to be made whilst the facts are fresh in the recollection of the justices, and it ought to be heard in the presence of the prosecutor (*g*); and in a plea to an action the grounds of the dismissal must be stated, so as to show that it is a bar (*h*). The act, however, does not apply to aggravated assaults, or to assaults in which any question of title, bankruptcy, or legal process is involved; sect. 29.

This action must be commenced within four years next after the cause of action (*i*). It does not lie against justices of the peace for

(*b*) Lib. Ass. anno 22. fol. 99, pl. 60; Br. Trespass, pl. 40.

(*c*) *Crosby v. Leng*, 12 East, 409.

(*d*) See *R. v. Robinson*, 12 A. & E. 672.

(*e*) *Tunnichliffe v. Tedd*, 5 C. B. 553;

17 L. J. (M. C.), 67.

(*f*) *Vaughton v. Bradshaw*, 8 C. B., N. S. 103; 30 L. J., C. P. 93.

(*g*) *Coleridge, J.*, in *R. v. Robinson*.

(*h*) *Skuse v. Davis*, 10 A. & E. 635.

(*i*) 21 Jac. I. c. 16, s. 3.

acts done by them in the execution of their duty (*k*), or against judges, unless they have acted without jurisdiction (*l*).

II. Declaration.

This is a transitory action (*m*), and consequently the venue may be laid in any county (*n*), except where it is otherwise directed by statute (*o*), as where the action is brought against justices of the peace (*p*), mayors, or bailiffs of cities, or towns corporate, head-boroughs, port-reeves, constables, tithing-men, churchwardens, overseers of the poor, &c., or *other* persons acting in their aid and assistance, or by their command, for anything done in their official capacity; in these cases the venue, by 21 Jac. I. c. 12, s. 5, must be laid in the county where the facts were committed, otherwise the jury who try the cause shall find the defendant not guilty, without any regard to any evidence given by the plaintiff touching the trespass, battery, &c. The provisions of the 21 Jac. I. c. 12, were, by 42 Geo. III. c. 85, s. 6, extended to all persons holding a public employment, or any office, station or capacity, civil or military, either in or out of the kingdom, and who, by virtue of such employment, had power to commit persons to safe custody; provided that, where an action shall be brought against such persons in this kingdom for any thing done out of this kingdom, the plaintiff may lay the act to have been done in Westminster, or in any county where the defendant shall reside. Actions brought against any persons for anything done by any officer of the customs, or excise, or others acting under the direction of commissioners of customs, in execution or by reason of their office, must be laid and tried in the county where the facts were committed (*q*).

The day is not material (*r*); proof of the trespass at any time before the commencement of the action being sufficient. An assault, being one entire individual act, cannot be committed at different times, and consequently ought not to be stated in the declaration to have been so committed (*s*). There should be a separate count for each distinct assault, whether on several occasions on the same day or on different days; for if the declaration contain only one count, the plaintiff, after proving one assault, cannot waive that and proceed to give evidence of another (*t*).

(*k*) 11 & 12 Vict. c. 44, ss. 1, 2; *Lock v. Ashton*, 12 Q. B. 871; 18 L. J., Q. B. 76.

(*l*) *Houlden v. Smith*, 14 Q. B. 841; 19 L. J., Q. B. 170.

(*m*) Litt. sect. 485.

(*n*) *Corbett v. Barnes*, Cro. Car. 444.

(*o*) See *Hughes v. Buckland*, 15 M. & W. 346.

(*p*) *I. e.* in those cases where this can be done. See *supra* and *Barton v. Brick-*

nell, 20 L. J., M. C. 1; *Newbould v. Colman*, *Ibid.* 149; 11 & 12 Vict. c. 44, s. 10.

(*q*) 3 & 4 Will. IV. c. 53, s. 107.

(*r*) Litt. sect. 485; 1 Inst. 283 a.

(*s*) *English v. Purser*, 6 East, 395; *Michell v. Neale*, Cowp. 828; *Burgess v. Freelove*, 2 B. & P. 425.

(*t*) *Stante v. Pricket*, 1 Campb. 473; 1 Wms. Saund. 299, n (*b*).

The declaration ought to allege the commission of the fact positively, and not by way of recital, *e. g.*, “for *that* on such a day the defendant assaulted, &c., the plaintiff,” and not, “for *that whereas*, &c.,” and it is no longer necessary to state that the assault was made “with force and arms,” and “against the peace of our lady the Queen” (*u*).

III. *Pleadings.*

General Issue.—The general issue to an action of assault and battery is not guilty, which constitutes a proper issue in case the defendant has not committed the injury complained of, of which touching for the purpose of calling attention on a fit occasion is an instance (*v*), or has committed the act by the plaintiff’s leave (*x*). So accident, or agency over which the defendant has no control, is a defence admissible under the general issue, as showing the act not to be his (*y*) ; but a defence admitting the trespass complained of to be the act of the defendant, and justifying or excusing it, &c., must be pleaded specially (*y*).

Under the general issue, matter of justification cannot be given in evidence in mitigation of damages, as such matter might have been pleaded (*z*). But where an action was brought against the captain of a ship, who pleaded not guilty, and the defendant cross-examined the plaintiff’s witness as to expressions used by the plaintiff, which would have justified the imprisonment, they tending to raise mutiny and disobedience ; the evidence of what was said by him *at the time* of the imprisonment was received in mitigation of damages, though it was objected to by the plaintiff ; for every thing that passed *at that time* is part of the transaction on which the plaintiff’s action is founded, and he could not be surprised by this evidence (*a*).

By 7 Jac. I. c. 5, “in any action upon the case, trespass, battery, or false imprisonment, against any justice of the peace (*b*), mayor, bailiff, constable, &c., for any thing done by virtue of their offices, and against all others acting in their aid or assistance, or by their command concerning their offices, they may plead the general issue, and give the special matter in evidence.” This statute was made perpetual by 21 Jac. I. c. 12 (*c*), and extended to churchwardens (*d*), overseers of the poor, and others acting in their aid

(*u*) 15 & 16 Vict. c. 76, s. 49.

(*v*) *Coward v. Baddeley*, 4 H. & N. 418 ; 28 L. J. Ex. 478.

(*x*) *Christopherson v. Bare*, 11 Q. B. 473 ; 17 L. J., Q. B. 109.

(*y*) *Hall v. Fearnley*, 3 Q. B. 919.

(*z*) *Watson v. Christie*, 2 B. & P. 225.

(*a*) *Bingham v. Gamaull*, Bull. N. P.

5th Ed. 17 ; *Syers v. Chapman*, 2 C. B., N. S. 438, *acc.*

(*b*) See *ante*, p. 45, n. (*p*).

(*c*) See, however, 21 Jac. I. c. 28, s. 1, by which it is continued only to the end of the then next session of parliament.

(*d*) See *Burton v. Henson*, 10 M. & W. 105.

or by their command. See similar provisions as to officers of customs and excise, 3 & 4 Will. IV. c. 53, s. 107; and justices of the peace, 11 & 12 Vict. c. 44, s. 10 (e). By the Pleading Rules of Hilary Term, 1853, it is required, that in the margin of the plea the words "by statute" shall be inserted, together with the year or years of the reign in which the act or acts of parliament upon which the defendant relies for that purpose were passed, and also the chapter *and* section of each of such acts, and shall specify whether such acts are public or otherwise: otherwise such plea shall be taken not to have been pleaded by virtue of any act of parliament: and such memorandum shall be inserted in the margin of the issue, and of the nisi prius record. The plea of the general issue "by statute" will not in general be allowed together with other pleas (f).

Money cannot be paid into court in this action (g).

Justification in Defence of Person.—If the plaintiff was the aggressor, and the injury of which he complains was occasioned by his own assault on the defendant, so that the act of the defendant became necessary for the defence of his person, the action cannot be maintained (h); because any degree of violence is justifiable, which is necessary for the safety of the person. This defence (i), which is technically termed *son assault demesne*, must be pleaded specially (j). In like manner a defendant may justify an assault and battery in the defence of his wife (k), child (l), or servant (m). So a wife may justify in defence of her husband (n), a child of a parent, and a servant of his master (o). Where a servant justifies in defence of his master, it ought to be alleged in the plea that the plaintiff would have beat the master, if the servant had not interposed; if the servant plead merely that he was servant to A., and that the plaintiff having assaulted his master in his presence, he in defence of his master struck the plaintiff, the plea is ill; for the assault on the master might be over, and the servant cannot strike by way of revenge, but in order to prevent an injury (p). Similarly, *per Lyndhurst, C.B.*, "If a person comes up to attack me and I put myself in a fighting attitude, this is not an assault on my part, and will not make out for that person a plea of *son assault demesne* (q).

(e) See *ante*, p. 45, n. (p).

(f) *Legge v. Boyd*, 1 M. & G. 898; *s. v. Langford v. Woods*, 7 M. & G. 625; and see *O'Brien v. Clement*, 15 M. & W. 435.

(g) 15 & 16 Vict. c. 76, s. 70.

(h) *Cockcroft v. Smith*, Salk. 642.

(i) See the form 15 & 16 Vict. c. 76, schedule (B.), form 45.

(j) 1 Inst. 282, b, 283, a; Pl. R. Hil. Term, 1853, R. 17.

(k) 2 Roll. Ab. 546, (D.) pl. 18; Bro.

Trespass, Pl. 128.

(l) Clerk's Assistant, pp. 90, 91.

(m) 2 Roll. Abr. 546, (D.) pl. 2; *s. v. per cur.* in *Leward v. Basely*, Salk. 407; Ld. Raym. 62; Bull. N. P. 18; because the master may have an action *per quod servitium amisit*.

(n) *Leward v. Basely*, Ld. Raym. 62.

(o) 2 Roll. Abr. 546, (D.) pl. 3; Adm. *per cur.* in Ld. Raym. 62, and Salk. 407.

(p) *Barfoot v. Reynolds*, Str. 953.

(q) *Moriarty v. Brookes*, 6 C. & P. 685.

Justification in Defence of Possession.—A defendant may justify in defence of his possession (*r*) ; as if A. enter the close of B. unlawfully, B., having first requested A. to depart (*s*), may, on his refusal, justify laying his hand on A. in order to remove him (*t*). So where A. seized the bridle of the horse on which B. was riding, it was held, that B., after a request to A. to desist, was justified in striking B. with his riding-whip, using no more force than was necessary to obtain his release (*u*). It must be observed that B. ought not to begin with striking, or offering violence to A. (*x*), for the law, in the first instance, merely allows B., in defence of his possession, after a request to A. to depart, to lay his hand gently on him. Hence a charge of beating, wounding, and knocking the party down, is not answered by a plea of *molliter manus imposuit* (*y*). If indeed A. should forcibly resist the endeavour to remove him, it will then be lawful to oppose force to force, and any degree of violence which may be necessary in self-defence will be justifiable. If the entry of the close be forcible (*z*), as by breaking down a gate, or the like, a previous request is unnecessary (*a*) ; for acts of violence, on the part of the trespasser, may be instantly opposed by such other acts of violence on the part of the owner, as may be necessary for the immediate defence of his possession (*b*).

In framing justifications in defence of possession, it is not necessary for the defendant to set forth the particulars of his title ; it is sufficient to state that defendant was possessed, &c. Thus :—trespass of assault, battery, and wounding. Plea to the assault and battery, that the defendant was possessed of a house for years ; that the plaintiff entered his house, and would have thrust him out of possession thereof, whereupon he *molliter manus imposuit*, to put him out, and the harm, if any done, was in defence of his own possession. On demurrer, it was contended, that the defendant ought to have set forth particularly, who made the lease, when it was made, and for how many years ; but the court held the plea good ; for the statement of the possession for years was only an inducement to the justification, the substance of which was, that he offered to thrust him out of the possession of his house, and that, the title or interest not coming in question, it was not necessary that the allegation should be as certain as where a claim of title was made by the defendant (*c*).

The observations which have been made in respect of the defence of real property, apply also to the defence of personal property, and

(*r*) 2 Roll. Abr. 548, (G.) pl. 2 ; *Al-
derson v. Waistell*, 1 C. & K. 358.

(*s*) *Green v. Goddard*, Salk. 641.

(*t*) See the form, 2 Lutw. 1435.

(*u*) *Rowe v. Hawkins*, 1 F. & F. 91.

(*x*) 2 Inst. 316.

(*y*) *Gregory v. Hill*, 8 T. R. 299 ; *No-*

den v. Johnson, 16 Q. B. 218 ; 20 L. J.,
Q. B. 95.

(*z*) *Milner v. M'Lean*, 2 C. & P. 17.

(*a*) *Polkinhorn v. Wright*, 8 Q. B. 197.

(*b*) *Weaver v. Bush*, 8 Tr. 78.

(*c*) *Skevill v. Avery*, Cro. Car. 138.

an owner of goods (or his servants) which are wrongfully taken out of his actual possession, or wrongfully detained after request, may justify an assault in order to repossess himself of them, no unnecessary violence being used (*d*).

Justifications by Officers executing Process.—In like manner a sheriff's officer cannot justify any act more than laying his hand on another for the purpose of executing legal process, unless acts of violence become necessary by a resistance on the part of the person apprehended, or an endeavour to rescue himself (*e*). A battery cannot be justified by showing an arrest merely (*f*), because an arrest may be made without touching the person, as if a bailiff comes into a room where the defendant is, and, having locked the door, tells him that he is arrested, that is an arrest; for the defendant is in the custody of the officer. In consequence of this decision, it was doubted, whether a defendant could justify a battery by stating that he gently laid his hands on the plaintiff; but this mode of pleading was adjudged to be good, in *Titley v. Foxall*, Willes, 688. And in *Tottage v. Petty*, Ca. temp. Hardw. 358, and MS., where to trespass for assault and battery, the defendant as to the assault and battery pleaded, that the plaintiff entered his house without his leave, and there disturbed him; whereupon the defendant requested the plaintiff to quit his house, and because the plaintiff would not, the defendant *gently laid his hands* on the plaintiff to thrust him out; on demurrer, the case of *Williams v. Jones*, was cited as an authority to show that this plea was bad; but Lord *Hardwicke*, C.J., said, "It was not determined by us in *Williams v. Jones*, that a battery could not be justified by a *molliter manus imposuit*, but that it could not be justified by merely showing an arrest." The court were clearly of opinion that the plea was good, and gave judgment for the defendant. "An officer cannot justify more than the assault, by virtue of the arrest, without showing that the plaintiff resisted or endeavoured to rescue himself, *unless it be by way of molliter manus imposuit, and in that manner he may justify the beating without showing any resistance or attempt to rescue.*" Bull. N. P. 19, cites *Titley v. Foxall*. In this case, however, as well as in the case of a plea of resistance, or an attempt to rescue, it is competent to the plaintiff to reply an unjustifiable or subsequent battery, as suggested by *Kingsmil*, J., in a case in 21 Hen. VII. "Que puis cel matter de ces mains le defendant batit le plaintiff" (*g*). Regularly, when

(*d*) *Blades v. Higgs*, 10 C. B. N. S. 713.

(*e*) *Truscott v. Carpenter*, Lord. Raym. 229; *Williams v. Jones*, Str. 1049; Ca. temp. Hard. 298.

(*f*) *Williams v. Jones*, Str. 1049.

(*g*) See Durnford's note, Willes's Reports, p. 17, n. (b), and see an excellent note on this subject, *Green v. Jones*, Saund. 299, 5th edit. 1845.

the defendant justifies under a writ, warrant, precept, or any other authority, he must set it forth in his plea (*h*).

Other Justifications.—The law looks with an indulgent eye on such acts of discipline as are necessary for the preservation of social order. Hence a master may moderately correct his servant, a parent his child (*i*), and a schoolmaster his scholar (*j*). In like manner an officer may justify the reasonable correction of those who are placed under his command, if they disobey his orders; and under particular circumstances a person may lay hands on another, in order to serve him with process (*k*). The defendant may justify even a *maihem* (*l*), if done by him as an officer in the army for disobeying orders; and he may give in evidence the sentence of the council of war upon a petition against him by the plaintiff; and if by the sentence the petition is dismissed, it will be conclusive evidence in favour of the defendant.

The several preceding instances of justifications must be pleaded specially (*m*). In framing these pleas the battery should be admitted (*n*).

Local and transitory Justifications.—If the cause of the justification be local (*o*), as if a constable arrests a man under a statute giving a special authority to a constable of the district only, the constable should justify the assault, &c., in the place where it really happened, showing his jurisdiction therein (*p*), and conclude with averment *quæ est eadem transgressio*, &c. (*q*). If the matter of the justification be transitory, it ought to follow the place laid in the declaration (*r*). Action for a battery at D.; the defendant justified under the command of certain bailiffs executing legal process at S., in the same county. The plea was held on general demurrer to be bad; for as the bailiffs have authority throughout the whole county, the cause of justification was not local, so that the defendant ought to have justified in the same place in which the plaintiff had declared (*s*). A battery in a man's own defence is not local (*t*), but may be justified in every place; consequently, such a justification must follow the place laid in the declaration. If a justification be at the same time and place, it is needless to aver, that it is the

(*h*) 1 Inst. 283 a; *Matthews v. Cary*, 3 Mod. 137, 138; Carth. 73, S. C.

(*i*) *Winterbourn v. Brooks*, 2 C. & K. 16.

(*j*) Rast. Entr. 613, pl. 18, 2nd ed.

(*k*) *Harrison v. Hodgson*, 10 B. & C. 445.

(*l*) *Lane and Degberg*, H. 11 Will. III., per Treby, C.J., London Sittings, Salk. MS.; Gilb. Ev. 37, ed. 1761; Bull. N. P. C. 19, S. C.

(*m*) 1 Inst. 282 b.

(*n*) *Gibbons v. Pepper*, Salk. 637, and Lord Raym. 38. Per Lord Denman, C.J., in *Hall v. Fearnley*, 3 Q. B. 921.

(*o*) 1 Inst. 282 a, b.

(*p*) *Jones v. Chapman*, 14 M. & W. 124; 14 L. J., Exch. 313.

(*q*) *Peacock v. Peacock*, Cro. Eliz. 705; *Bridgwater v. Bythway*, 3 Lev. 113.

(*r*) 1 Inst. 282 a, b.

(*s*) *Bridgwater v. Bythway*, 3 Lev. 113.

(*t*) *Purset v. Hutchings*, Cro. Eliz. 842.

same trespass (*u*). Where the defendant pleads a local justification, the plaintiff may vary in his replication, either in time or place, from the time or place laid in the declaration, and it will not be a departure (*x*). The defendant may plead not guilty within four years next after the cause of action (*y*).

Replication.—The usual replication to the preceding justifications, where they consist merely of matter of fact, used to be, that the defendant committed the trespass of his own wrong, and without the cause alleged by him in his plea. This was termed a replication *de injuriâ*, and had the advantage of putting in issue every material allegation, no matter how many, contained in the plea; which was a considerable advantage, as only one material allegation in a pleading could, as a general rule, be traversed, without infringing the rule against duplicity in pleading. Since the Common Law Procedure Act, 1852, all the advantage of this replication may now be obtained in every case at this state of the pleadings, and a like advantage at all subsequent stages, by joining issue as provided by ss. 77, 78, 79 (*z*). If the defendant pleads *son assault demesne*, and the plaintiff can justify it, such justification ought to be replied specially; for it cannot be given in evidence under the general replication of *de injuriâ* (*a*). On the general replication of *de injuriâ* to *son assault demesne* (*b*), the plaintiff cannot give in evidence a battery at a day and place different from that laid in the declaration. Hence if there are two assaults, one of which the defendant can justify and the other not (*c*), the plaintiff must new assign the assault for which he brings his action, otherwise the defendant will be entitled to a verdict on his justification. So “if there were two batteries on one day, and the one were on the plaintiff’s own assault and the other not, if the defendant will justify one *de son assault demesne*, the plaintiff may make a new assignment of the other battery” (*d*). A new assignment, however, in these cases, is only necessary where there is but one count in the declaration: for if the declaration contain as many counts as there were assaults, &c., and some of them cannot be justified, the plaintiff may prove those without a new assignment (*e*). Where the plaintiff declares on a single act of assault and battery, to which the defendant pleads *son assault demesne*, the plaintiff may now, it would seem (*f*), by leave of a judge, reply *de injuriâ*.

(*u*) *King v. Phippard*, Carth. 281.

(*x*) *Serle v. Darford*, Lord Raym. 120, and Lutw. 1435.

(*z*) 21 Jac. I. c. 16, s. 3.

(*y*) Bullen & Leake on Pleading, 390; *Dean v. Taylor*, 11 Ex. 68; *Glover v. Dixon*, 9 Ex. 158.

(*a*) *King v. Phippard*, Carth. 281; *Webber v. Liversuch*, 1 Peake’s Add. C. 51.

(*b*) *Downs v. Skrymsher*, 1 Brownl. R.

233.

(*c*) 2 Roll. Abr. 680 (C.), pl. 3; *Walsby v. Oakley*, London Sittings after M. T. 40 Geo. III. MS. S. P. per Kenyon, C. J.

(*d*) *Per cur.* in *Elwis v. Lombe*, 6 Mod. 120.

(*e*) Bull. N. P. 17.

(*f*) *Franks v. Morris*, 10 East, 81 n.; and see *Worth v. Terrington*, 13 M. & W. 781; 14 L. J., Exch. 7.

and also new assign (*g*) that the defendant used more violence than necessary for the defence of himself; 15 & 16 Vict. c. 76, s. 81: but if he "joins issue" on the defendant's plea under the provisions of the Common Law Procedure Act, 1852, this is not necessary, as under that form of issue he may show that, although he struck the first blow, the defendant was guilty of excess (*h*); although this is otherwise with regard to a trespass *extra viam* (*i*).

Where the defendant pleaded that the plaintiff was defendant's apprentice, and conducted himself improperly, *wherefore* defendant moderately chastised him, the replication *de injuriâ* was held to put in issue only the cause alleged in the plea (that is, whether the plaintiff misconducted himself as an apprentice), and not the moderation of the punishment (*k*).

IV. Verdict and Judgment.

Damages may be given in this action not merely for the corporal injury, which in many cases may be very small, but also for the degrading insult with which it is accompanied. In *Brown v. Allen*, 4 Esp. 158, a case of joint trespass, in which it was proved that one defendant had acted more violently than the other, Lord *Ellenborough* told the jury that the true criterion of damage was the amount which the most culpable ought to pay. *Lowfield v. Bancroft*, Str. 910, and Bull. N. P. 15, is to the same effect. In *Clark v. Newsam*, 1 Exch. 131, however, it was laid down that the true criterion of damage is the aggregate of the injury received from both, without regard to the motives of either defendants; and this would seem to be the better test.

A libel written by the plaintiff against the defendant may be given in evidence by the defendant in mitigation of damages, although a cross action be pending for the libel (*l*). Against joint trespassers there can be but one satisfaction, and, therefore, if they are sued in one action, although they sever in pleas and issues, yet one jury shall assess damages against all; and if all the issues are found for the plaintiff, the jurors ought not to sever the damages; for, if they do, the verdict will be vicious (*m*). And if in such case judgment be entered for the separate damages, such judgment will be erroneous (*n*). But, before judgment, the defect of the verdict may be cured, by the entry of a *nolle prosequi* against all the

(*g*) See 15 & 16 Vict. c. 76, s. 87, and 338.

Sched. (B.), Forms 55, 56, 57; *Glover v. Dixon*, 9 Exch. 158.

(*h*) *Dean v. Taylor*, 11 Exch. 68.

(*i*) *Glover v. Dixon*, 9 Exch. 158.

(*k*) *Penn v. Ward*, 2 Cr. M. & R.

(*l*) *Fraser v. Berkeley*, 7 C. & P. 621.

(*m*) Hob. 66; *Elliot v. Allen*, 1 C. B. 18.

(*n*) *Crane v. Hummerstone*, Cro. Jac. 118; *Hill v. Goodchild*, 5 Burr. 2791.

defendants except one, and taking judgment against that one only (*o*). So if joint defendants suffer judgment by default, and the plaintiff execute separate writs of inquiry against them, whereupon several damages are given, it is irregular; and if final judgment be entered for those damages, such judgment will be erroneous (*p*). But, before final judgment, the court will permit the plaintiff, in order to cure the error, to set aside his own proceedings upon payment of costs, and to issue a new writ of inquiry.

(*o*) *Rodney v. Strode*, Carth. 19.

(*p*) *Mitchell v. Milbank*, 6 T. R. 199.

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CHAPTER V.

OF THE ACTION OF ASSUMPSIT.

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I. *Of the Action of Assumpsit, and of the Agreement for the Non-performance of which this Action may be maintained.*

THE action of assumpsit is an action of trespass on the case, whereby a compensation, in damages, may be recovered for an

injury sustained by the non-performance of a parol agreement. Agreements are distinguished into agreements by specialty, *i. e.* by deed under seal, and agreements by parol. The law of England does not recognize any other distinction. If agreements are merely written, and not specialties, they are parol agreements (*a*). The action of assumpsit is confined to agreements by parol, the action of covenant or debt being the proper remedy for the non-performance of agreements by specialty (*b*), for it is a general rule that assumpsit will not lie where there is a remedy of a higher nature (*c*). The essential parts of every parol agreement are, the promise or undertaking of one party, and the consideration on which such promise or undertaking is founded, proceeding from the other party. Sometimes the promise is expressed by the party; sometimes it is raised by implication of law. In the former case it is termed an express, in the latter an implied, promise. In parol agreements the law will not imply a consideration (except in the case of bills of exchange and promissory notes, which depend upon the law merchant); consequently, in actions of assumpsit, a consideration must be stated and proved.

Of the consideration.—Every promise, for the non-performance of which an action of assumpsit may be maintained, must be founded on a sufficient consideration (*d*), and no action will lie for a mere nonfeasance, unless the promise is founded on a consideration (*e*). This consideration is either of benefit to the defendant (*f*) or of benefit to a stranger (*g*), or of damage, or of loss (*h*) sustained by the plaintiff, *at the request* of the defendant; and herein the law of England adopts and recognises the rule of the civil law, *ex nudo pacto non oritur actio* (*i*). Any act of the plaintiff, from which the defendant derives, or expects to derive (*k*), a benefit or advantage, or any labour, detriment (*l*), or inconvenience sustained by the plaintiff, however small (*m*) the benefit or inconvenience may be, is a sufficient consideration, if such act is performed, or such inconvenience suffered by the plaintiff, at the request or with the consent (*n*), either express or implied, of the defendant. The giving up to the defendant a void guarantee

(*a*) *Rann v. Hughes*, 7 T. R. 351, n.

(*b*) *Bennus v. Guyldeley*, Cro. Jac. 505.

(*c*) *Bulstrode v. Gilburn*, 2 Str. 1027;
Schlencker v. Moxsy, 3 B. & C. 789;
Baber v. Harris, 9 A. & E. 532.

(*d*) 1 Roll. Abr. 9, line 41; Doct. and Stud. Dial. 2, ch. 24.

(*e*) *Elsee v. Gatward*, 5 T. R. 143.

(*f*) *Per Buller, J.*, in *Nerot v. Wallace*, 3 T. R. 24; and *Cooke v. Oxley*, 3 T. R. 653.

(*g*) *Per Gawdy and Fenner, Js.*, in *Greenleaf v. Barker*, Cro. Eliz. 194.

(*h*) *Per Ellenborough, C.J.*, in *Bunn*

v. Guy, 4 East, 194. See *Bainbridge v. Firmstone*, 8 A. & E. 743.

(*i*) 17 Edw. IV. 4 b.; Plowd. 305, a, 308, b; and see *per Campbell, C.J.*, in *Gerhard v. Bates*, 2 E. & B. 487.

(*k*) *Haigh v. Brooks*, 10 A. & E. 309.

(*l*) *Williamson v. Clements*, 1 Taunt. 523.

(*m*) *Sturlyn v. Albany*, Cro. Eliz. 67; *March v. Culpepper*, Cro. Car. 70. See *Bailey v. Croft*, 4 Taunt. 611, *post*, p. 58; *Jones v. Waite*, 5 B. N. C. 341.

(*n*) *Stokes v. Lewis*, 1 T. R. 21; *Child v. Morley*, 8 T. R. 610.

for instance, and even the paper on which it is written is sufficient (*o*); and so if A. places a sum of money in the hands of B. for the purpose of handing it over to C. (*p*), or investing it *securely* (*q*), this is sufficient to raise an assumpsit by B. It is, however, clearly established, that the consideration must be of *some* value, in contemplation of law (*r*); for where A. in consideration that B. would make an estate at will to him, as his counsel should advise, promised, &c., it was held a void promise, for want of a sufficient consideration, because B. might immediately determine his will (*s*). So where the testator had committed to the care of the defendant his children, and the disposition of his goods, during their minority, *for their education*, and thereupon the defendant promised the testator to procure the assurance of certain lands to one of the testator's children, the consideration was held insufficient; for the law would not intend that the defendant had made any private gain to himself, but that he had disposed of the goods for the benefit of the children, according to the trust reposed in him (*t*). So where the consideration stated was the conveyance of all the interest of A. in certain property to third parties, but it appeared that no interest had in reality passed by the conveyance, although executed at defendant's request, the declaration was held bad after verdict, as not disclosing any legal consideration (*u*).

The mere performance of an act, which the party was by law or agreement (*x*) bound to perform, is not a sufficient consideration (*y*) for a new promise to the same individual (*z*). Hence a promise made by the master, when a ship was in distress, to pay an extra sum to a mariner as an inducement to extraordinary exertion on his part, has been held to be void; because a seaman is bound to exert himself to the utmost in the service of the ship (*a*). So where, in the course of a voyage, some of the seamen deserted, and the captain not being able to find others to supply their place, promised to divide the wages, which would have become due to them, among the remainder of the crew, it was held, that this promise was void for want of a consideration; for the desertion of a part of the crew was to be considered as an emergency of the voyage as much as their death, and the remainder of the crew were bound, by the terms of their original contract, to exert themselves to the utmost to bring the ship in safety to her destined port (*b*). So where a mercantile account

(*o*) *Hart v. Miles*, 27 L. J., C. P. 218, *acc. Haigh v. Brooks*, 10 A. & E. 309.

(*p*) *Wheatley v. Low*, Cro. Jac. 667; *Shilliber v. Glynn*, 2 M. & W. 143.

(*q*) *Whitehead v. Greetham*, 2 Bing. 464.

(*r*) *Per Patteson, J., Thomas v. Thomas*, 2 Q. B. 851.

(*s*) 1 Roll. Abr. 23, pl. 29.

(*t*) *Smith v. Smith*, 3 Leon. 88.

(*u*) *Kaye v. Dutton*, 2 D. & L. 291; 13 L. J., C. P. 183.

(*x*) *Jackson v. Cobbin*, 8 M. & W. 790.

(*y*) *Per Parke, B., Crowhurst v. Laverrack*, 8 Exch. 208.

(*z*) *Scotson v. Pegg*, 6 Ex. 295.

(*a*) *Harris v. Watson*, Peake, N. P. C., 3 ed., 102, Lord Kenyon, C.J.

(*b*) *Stilk v. Myrick*, 2 Campb. 317.

was agreed to between the plaintiff and defendant, upon which by usage interest at £5 *per cent.* was payable, an agreement by defendant to pay interest at that rate was held insufficient to support a promise by the plaintiff, not to require the principal without six months' notice (*c*). But where the defendant offered a reward to any person who would give such information as would lead to the conviction of a felon, the plaintiff, a constable of the district where the felony was committed, was held entitled to the reward on giving the requisite information, as it involved the performance of services which he was not bound to render, and so formed a good consideration (*d*). So, where the plaintiff agreed to enter as captain's cook on board of a brig of war, upon an undertaking by the defendant, the commander of the vessel, to pay him wages beyond the government pay, which he would be entitled to on his rating as an able seaman; it was held, that there was a sufficient consideration for the agreement to entitle the plaintiff, on the services being performed, to maintain an action against the defendant for the extra wages (*e*). So, the performance of an act which a person has agreed with another to perform, is a good consideration to support a contract with a third person if the latter derives a benefit from the performance (*f*), or the former sustains a loss at the latter's request (*g*). Therefore, where a declaration stated that in consideration that the plaintiff would deliver to the defendant a cargo of coals on board the plaintiff's ship, the defendant promised to discharge the same at the rate of forty-nine tons a day, it was held that a plea was no answer which stated that the plaintiff had made a previous contract with other persons for the delivery of the coals to their order in the same way, and they ordered the delivery to the defendant (*h*). And so, where A., being about to marry B., the uncle of A. addressed him by letter thus: "I am glad to hear of your intended marriage with B., and as I promised to assist you at starting, I am happy to tell you that I will pay to you £150 yearly," &c., it was held that the letter showed a good consideration to support an action against the executors of the uncle for arrears of the annuity (*i*).

Natural affection, although sufficient to raise an use, is not a sufficient consideration whereon an assumpsit may be founded (*k*). A release of an equity of redemption is a good consideration, and the common law will take notice, that the mortgagor has an equity to be relieved in Chancery (*l*). Where A. is indebted to B. in one

(*c*) *Orme v. Galloway*, 9 Exch. 544; 23 L. J., Exch. 118.

(*d*) *England v. Davidson*, 11 A. & E. 857; and see *Gerhard v. Bates*, 2 E. & B. 487.

(*e*) *Clutterbuck v. Coffin*, 3 M. & G. 842.

(*f*) *Scotson v. Pegg*, 6 Exch. 295.

(*g*) *Shadwell v. Shadwell*, 9 C. B. N.

S. 159.

(*h*) *Scotson v. Pegg*, 6 Exch. 295.

(*i*) *Shadwell v. Shadwell*, 9 C. B. N. S. 159.

(*k*) *Bret v. J. S.*, Cro. Eliz. 755. See also *Thomas v. Thomas*, 2 Q. B. 851; *White v. Bluett*, 2 C. L. R. 301.

(*l*) *Thorpe v. Thorpe*, Lord Raym. 663; *Wells v. Wells*, 1 Lev. 273; but see

sum, and B. is indebted to C. in a less sum, if B. promises A. to discharge him of so much of his debt as amounts to B.'s debt to C., this will be a good consideration for a promise by A. to pay C. the debt due to him from B. (m). A mere accord is no consideration (n).

The defendant being indebted to the testator in a sum of money upon simple contract, the plaintiff, his executor, agreed to take a less sum, payable by instalments, in lieu of the original debt; in consideration whereof, the defendant promised the executor to pay him the lesser sum. On assumpsit brought, an exception was taken, in arrest of judgment, that the consideration was insufficient, because it did not appear that the plaintiff had discharged the defendant of the original debt. But the objection was overruled, because the original debt being due to the plaintiff, as executor, the action to recover that must have been in the detinet; but by the agreement on the part of the plaintiff to take a less sum, and the promise by the defendant to pay that sum, it became the proper debt of the plaintiff, and the action for it maintainable in his own name, without being named executor. And (by *Yelverton*, Justice) although the less sum is not any satisfaction of the greater, because they are both of one nature, yet in respect that the nature of the action was changed, it was, therefore, a good consideration (o).

In order to facilitate the making of an agreement, for which there was sufficient consideration between the plaintiff and a third person, the defendant, who received no benefit to himself by the agreement, became party thereto; it was held, that as the agreement was such as the plaintiff would not have made, unless the defendant had acceded, there was a sufficient consideration for the defendant's promise (p).

Forbearance of Suit—in what Cases a sufficient Consideration,—If a creditor, at the request of his debtor, forbear to sue him for a certain time, that is a sufficient consideration for a new promise by the debtor, for the non-performance of which an action of assumpsit may be maintained. So if a creditor at the request of J. S. forbear to sue his debtor for a certain time, that is a sufficient consideration to support a promise by J. S. to pay the debt (q). But by Stat. of Frauds, 29 Car. II. c. 3, s. 4, this agreement must

Preston v. Christmas, 2 Wils. 87. How far a moral obligation is a sufficient consideration, see a note to *Wennall v. Adney*, 3 B. & P. 249, cited in *Eastwood v. Kenyon*, 11 A. & E. 438; and see *post*, p. 65; and so of the assignment of a chose in action; *Mouldsdale v. Burchall*, 2 W. Bl. 820; per *Buller, J.*, *Master v. Miller*, 4 T. R. 341; per Lord *Ellenborough*, in *Surtees v. Hubbard*, 4 Esp. 203.

(m) *Gouldsbrough*, 49; and see *Fairlie v. Denton*, 8 B. & C. 395.

(n) *Lynn v. Bruce*, 2 H. Bl. 317. See *Cook v. Wright*, 1 B. & S. 559; *Smyth v. Holmes*, 10 Jur. 862.

(o) *Goring v. Goring*, *Yelv.* 10, 11.

(p) *Bailey v. Croft*, 4 Taunt. 611.

(q) 1 Roll. Abr. 27, pl. 49; *Tempson v. Knowles*, 7 C. B. 651; 18 L. J., C. P. 222.

be in writing (*r*). Forbearance to sue an executor (having assets) for a *certain* time upon a simple contract debt of his testator, is a good consideration to found a promise by the executor to pay the debt (*s*). So forbearance for a *reasonable* time to sue an executor for the debt of his testator, although the executor have not assets (*t*); but the agreement by the executor to pay the debt must be in writing (*u*), otherwise it will be void by Stat. of Frauds, 29 Car. II. c. 3. s. 4. That a forbearance to sue may be a good consideration, such forbearance must either be absolute (*x*), or for a definite portion of time (*y*), or for a reasonable time (*z*); forbearance for a little, or some time (*a*), is not sufficient. A forbearance for a given time on the part of the assignee of a bond to sue the obligor, is a good consideration for a promise by the obligor to pay the assignee at the expiration of that time, or to give him a warrant of attorney for the amount (*b*). In cases where an action is brought against a defendant, on a promise made in consideration of forbearance of suit, an objection will not be allowed, after verdict, that the declaration does not state how the original debt accrued; for this is only inducement to the action (*c*). But it must appear that there is, or that plaintiff had a reasonable ground for believing that there was, a debt actually due (*d*). If an action had been actually commenced (*e*), the law will intend that there was some foundation for it (*f*), unless the contrary be pleaded (*g*), or that there were cross claims unsettled between the parties, although each party claimed the balance (*h*). A compromise of a claim may be a good consideration for a promise, although no litigation has commenced, and although there is really no legal claim, provided the claimant *bond fide* believes there is, and really intends to pursue his claim (*i*), and the declaration should state to whom the plaintiff forbore and gave day of payment (*k*), although the omission will, it seems, be cured by verdict (*l*).

The consideration of forbearance is not confined to forbearance from suing by *action*; for forbearance to sue, though the party is liable in equity only (*m*), or desisting from a suit in Chancery (*n*); or the giving up a suit instituted in the Admiralty Court, to try a

- (*r*) *King v. Wilson*, Str. 873.
- (*s*) *Bond v. Payne*, Cro. Jac. 273.
- (*t*) *Johnson v. Whitchcott*, 1 Roll. Abr. 24, pl. 33.
- (*u*) *Grindall v. Davies*, 1 Freem. 532.
- (*x*) *Maples v. Sidney*, Cro. Jac. 683.
- (*y*) *Fish v. Richardson*, Cro. Jac. 47.
- (*z*) *Johnson v. Whitchcott*, *supra*.
- (*a*) 1 Roll. Abr. 23, pl. 25, 26; and see *Deacon v. Gridley*, 15 C. B. 295; 22 L. J., C. P. 17.
- (*b*) *Morton v. Burn*, 7 A. & E. 19.
- (*c*) *Austen v. Bewley*, Cro. Jac. 548.
- (*d*) *Edwards v. Baugh*, 11 M. & W. 641.
- (*e*) *Smith v. Monteith*, 13 M. & W. 427.
- (*f*) *Tempson v. Knowles*, 7 C. B. 651; 18 L. J., C. P. 222.
- (*g*) *Wade v. Simeon*, 2 C. B. 548.
- (*h*) *Llewellyn v. Llewellyn*, 3 D. & L. 318; 15 L. J., Q. B. 4.
- (*i*) *Cook v. Wright*, 1 B. & S. 559.
- (*k*) *Jones v. Ashburnham*, 4 East, 445.
- (*l*) *Marshall v. Birkenshaw*, B. & P. 172.
- (*m*) *Scott v. Stephenson*, 1 Lev. 71.
- (*n*) *Dowdenay v. Oland*, Cro. Eliz. 768.

question respecting which the law is doubtful (*o*), has been held to be a good consideration; and so has forbearing to require sureties of the peace against the defendants (*p*); so forbearing to proceed upon a *capias utlagatum* (*q*). So staying the trial of a cause after issue joined (*r*), is a good consideration for a promise to pay the costs incurred. So, an agreement by A. to abandon a reference and discharge B. from his promise to refer the matters originally in difference upon B.'s paying a sum of money is a good consideration in an action by A. against B. for that sum of money (*s*). Neither is it necessary to show a consideration equally extensive with the promise; for forbearance by the plaintiff, at the defendant's request, to enforce a *fi. fa.* against the goods of a third person for 60*l.* is a valid consideration for defendant's promise to pay plaintiff 107*l.* in seven days (*t*). And where an action has been commenced for an *unliquidated* demand, payment by the defendant of a *liquidated* sum, is a good consideration for a promise by plaintiff to stay proceedings, and pay his own costs (*u*).

In what Cases Forbearance of Suit is not a Consideration.—Forbearance of suit against a defendant, where originally there was not any cause of action, and where the plaintiff must necessarily have failed, is not a consideration to support an assumpsit (*w*). A. and B. were bound jointly and severally in a bond to C. who released A.; afterwards B., in consideration that C. would forbear to sue him for the payment of the money due on the bond, promised to pay it. On assumpsit brought, the court were clearly of opinion, that the debt having been entirely discharged by the release (*x*) made by the obligee to A., there was not any consideration whereon an assumpsit might be grounded (*y*). So, where in assumpsit, it was stated, that there were controversies between the plaintiff and defendant concerning the profits of certain lands, which the father of the defendant had taken in his lifetime, and that the plaintiff had purchased a writ out of Chancery to the intent to exhibit a bill against the defendant for the said profits; the defendant, in consideration that the plaintiff would surcease his suit, promised the plaintiff that if he could prove, that the father of the defendant had taken the profits, or had the possession of the lands, under the title of the father of the plaintiff, he, defendant, would pay the plaintiff for the said profits. After verdict for the plaintiff upon non assumpsit, the court were of opinion, that there was not any good consideration; for it was not

(*o*) *Longridge v. Dorville*, 5 B. & Ald. 117.

(*p*) *Rippon v. Norton*, Cro. Eliz. 881.

(*q*) *Jennings v. Harley*, Cro. Eliz. 909, and Yelv. 19.

(*r*) *Dell v. Fereby*, Cro. Eliz. 868; *Crowther v. Farrer*, 15 Q. B. 677; 20 L. J., Q. B. 298.

(*s*) *Smyth v. Holmes*, Ex. 10 Jur. 862.

(*t*) *Smith v. Algar*, 1 B. & Ad. 603.

(*u*) *Wilkinson v. Byers*, 1 A. & E. 106.

(*w*) *Wade v. Simeon*, 2 C. B. 567.

(*x*) 1 Inst. 232, a.

(*y*) *Hammon v. Roll*, March, 202; see *Wade v. Simeon*, 2 C. B. 548.

alleged that the defendant was heir or executor; and even if it had been so alleged, yet there was not any cause to charge him for a personal tort (z). So where the declaration stated that *disputes and controversies* were pending between the plaintiff and defendant as to whether or not the defendant was indebted to the plaintiff in the sum of 173*l.* 2*s.* 3*d.*, for money lent, &c., and thereupon in consideration that the plaintiff would then promise the defendant not to sue him for the said sum, and would accept from the defendant the sum of 100*l.* in full satisfaction and discharge of the same; the defendant promised the plaintiff to pay him the said sum of money within a reasonable time. Breach, the non-payment of the said sum of 100*l.* It was held that the declaration was bad, as not showing a sufficient consideration for the promise; it was not alleged that any debt was due to the plaintiff from the defendant, or that a reasonable doubt existed between the parties as to the existence of a debt, or that any suit was pending, the termination of which would be any benefit to the defendant or detriment to the plaintiff (a). So where the declaration stated, that the father of the defendant became bound to the plaintiff by bond, with a penalty, conditioned for the payment of money at a day past, and which was not paid, and afterwards the father died; and the plaintiff intending to sue the defendant as son and heir on the bond, the defendant, in consideration that the plaintiff would forbear his intended suit against the defendant promised to pay the debt: after verdict for the plaintiff, judgment was arrested on the ground that there was not any consideration; for it did not appear, that the defendant's ancestor had bound himself *and his heirs*, and if the heir was not bound expressly by name, he was not bound at all (b). So where a bill was brought by the obligee in a bond against the heir of the obligor, alleging that he having assets by descent ought to satisfy the bond; the defendant demurred because the plaintiff had not expressly alleged, *that the heir was bound in the bond*; and the demurrer was allowed (c). So where testator was indebted to the plaintiff for money lent, and for merchandise sold and delivered, and promised to pay the plaintiff on a certain day, and died before the day: the plaintiff intending to sue the defendant, the executor, he, in consideration of forbearance for a certain time, promised to pay the debt. The defendant pleaded, that, at the time of the delivery of the goods, the testator was an infant. On demurrer, it was adjudged, that an action would not lie; for the contract of the infant was void, and there was not originally any cause of action against the testator (d). So where a *feme covert* trading as a feme sole in the city of London, purchased of the plaintiff articles

(z) *Tooley v. Windham*, Cro. Eliz. 206.(a) *Edwards v. Baugh*, 11 M. & W.641.
(b) *Barber v. Fox*, 2 Saund. 136; seealso *Hunt v. Swain*, 1 Lev. 165.(c) *Crosseing v. Honor*, 1 Vern. 180.(d) *Stone v. Wythipoll*, Cro. Eliz. 126.

in the way of her trade, and, after her death, her husband promised to pay for them; it was held to be a void promise, for want of a consideration, the husband not being liable (e). So, where a married woman gave a promissory note as a *feme sole*, and after her husband's death, in consideration of forbearance, promised to pay it, *Pratt, C. J.*, held, that the note was absolutely void; and forbearance, where originally there was not any cause of action, was not a consideration to support an assumpsit. He added, that it might be otherwise where the contract was only voidable (f).

The mere relation of landlord and tenant is a sufficient consideration for the tenant's promise to manage a farm in a husbandlike manner (g); but not to keep a messuage in good and tenantable repair (h). But where defendants had for several years, as assignees of a void lease, occupied and paid the rent reserved, it was held, that they were liable to all the stipulations in the lease in the same way as a tenant who holds over, upon the expiration of a valid lease; and, among others, to the covenant for repair (i). Neglect to cultivate the glebe land in a husbandlike manner is not actionable, there not being any such implied contract between the parson and his successor (k).

Consideration must move from Plaintiff.—The consideration on which the promise of the defendant is founded, must move from the plaintiff. Therefore where the plaintiff declared, that A. being indebted to the plaintiff and defendant in two several sums of money, and B. being indebted to A. in another sum, the defendant, in consideration that A. would permit the defendant to sue B. in his (A.'s) name, for the recovery of the sum due from B. to him, promised that he the defendant would pay A.'s debt to the plaintiff, and alleged that A. permitted the defendant to sue accordingly, and that he recovered; after verdict for the plaintiff, it was moved in arrest of judgment, that the plaintiff could not maintain this action; and of this opinion were the court, observing, that the plaintiff was a mere stranger to the consideration, having done nothing of trouble to himself, or of benefit to the defendant (l). So where the plaintiff declared, that in consideration that one J. S. would make the defendant a title to a house, the defendant promised to pay to the plaintiff a certain debt owing from J. S. to him the plaintiff, and then averred that J. S. was always ready to perform his part of the agreement, but that the defendant had not paid the said debt; on demurrer, judgment was given for the defendant, because the plaintiff was a stranger to the consideration (m). But if A. remits money to B. to pay to C., and B.

(e) *Fabian v. Plant*, 1 Show. 183.

(f) *Lloyd v. Lee*, 1 Str. 94.

(g) *Powley v. Walker*, 5 T. R. 373.

(h) *Horsefall v. Mather*, Holt's N. P. *Jackson v. Cobbin*, 8 M. & W. 790.

(i) *Beale v. Sanders*, 3 B. N. C. 850.

(k) *Bird v. Relph*, 4 B. & Ad. 826.

(l) *Bourne v. Mason*, 1 Vent. 6.

(m) *Crow v. Rogers*, Str. 592; *Price v. Easton*, 4 B. & Ad. 433.

promises A. to pay it to him, and allows C. to be told this, C. may maintain an action against B. for money had and received; for the consideration does move from C. through the instrumentality of A. B. assents to become the agent of C. at his request (*n*). And where the declaration stated, that in consideration that the plaintiff and A. B. would sell to the defendant a business, the defendant promised the plaintiff to pay him money, &c., it was held not necessary that A. B. should join in the suit (*o*).

The plaintiff declared, that his wife's father being seised of lands then descended to the defendant, and being about to cut down 1000*l.* worth of timber to raise a portion for his daughter, the defendant, being his heir, promised the father, in consideration that he would forbear to fell the timber, to pay the daughter 1000*l.*: after verdict for the plaintiff, it was moved in arrest of judgment, that the action ought not to have been brought by the daughter, but by the father; or if the father were dead, by his executors; for the promise was made to the father, and the daughter was neither privy nor interested in the consideration, nothing being due to her; but *Scroggs*, C. J., said, that there was such apparent consideration of affection from the father to his children, for whom nature obliged him to provide, that the consideration and promise to the father might well extend to the children. Judgment for the plaintiff; for the son had the benefit by having the wood, and the daughter had lost her portion by these means (*p*). This case would seem to support the proposition that a stranger to the consideration of a contract may maintain an action upon it if he stands in such near relationship to the party from whom the consideration proceeds, that he may be considered a party to the consideration. Although this case was in the Exchequer Chamber, there is no modern case in which it has been supported (*q*).

The Consideration must be such as the Party undertaking has Power by Law to perform.—The plaintiff declared, that he being bailiff to J. S., the defendant, in consideration that the plaintiff would discharge the defendant of a debt due to J. S., promised, &c. After judgment for the plaintiff in the court below, it was reversed in B. R., because the plaintiff could not discharge a debt due to his master (*r*). The principle established by this case was recognized by *Kenyon*, C. J., in *Nerot v. Wallace*, 3 T. R. 22, where the consideration was, that the plaintiffs, the assignees of J. S., a bankrupt, would forbear to have J. S. examined before the commissioners, and that the commissioners would forbear accordingly. Lord *Kenyon* said, "The ground on which I found my

(*n*) *Lilly v. Hays*, 5 A. & E. 548.

(*o*) *Jones v. Robinson*, 1 Exch. 454; 17 L. J., Exch. 36.

(*p*) *Dutton v. Poole*, 2 Lev. 210 (Exch. Ch.); *Martyn v. Hind*, Cowp. 443. See

also *Bourne v. Mason*, and cases there cited, 1 Ventr. 60.

(*q*) *Tweddle v. Atkinson*, 1 B. & S. 393.

(*r*) *Harvey v. Gibbons*, 2 Lev. 161.

judgment is this, that every person who, in consideration of some advantage, either to himself or another, promises a benefit, must have the power of conferring that benefit up to the extent to which he professes that benefit should go, and that not only in fact but in law. Now as to the promise made by the assignees in this case, which was the consideration of the defendant's promise, it was not in their power to perform it, because the commissioners had nevertheless a right to examine the bankrupt. And no collusion of the assignees could deprive the creditors of the right of examination, which the commissioners would procure them. The assignees stipulated, not only for their own acts, but also that the commissioners should forbear to examine the bankrupt; but clearly they had no right to tie up the hands of the commissioners by any such agreement. And if any proposal of that sort had been made to the commissioners, they, as acting in a public duty, would have been guilty of a breach of that duty in acceding to it." It must not however be inferred from the above language, that a party may not stipulate for the act or forbearance of a stranger, and that such stipulation will not in any case form a sufficient consideration; if the act be such as the stranger might do or abstain from doing legally, or without any breach of duty, no objection can be raised to such a consideration.

Consideration past or executed.—A consideration, past or executed, will not support a subsequent promise, unless the act was done at the request, either expressed or implied, of the party promising (s). As, if the servant of A. be arrested for a trespass, and J. S. without the request of A. bails the servant, (which is a mere voluntary courtesy (t)), and afterwards A. promises J. S. to indemnify him, the promise is void; because the bailing, which was the consideration, was past and executed before (u). But where the act which forms the consideration is done at the request of the party promising, the circumstance of the promise being subsequent in point of time to the consideration will not affect it. As, if A. requests B. to endeavour to procure a pardon for A., and after B. has made such endeavour, A., in consideration thereof, promises to pay him a certain sum of money, this is a good consideration (x). And so if a courtesy be moved by a suit or request of the party promising, it will bind; for the promise, though it follows, yet is it not naked, but couples itself with the suit before, and the merits of the party procured by that suit, which is the difference. "Where the act of the plaintiff and the promise of the defendant take place at the same time, the law does not require, as in the case of a bygone transaction, that, in order to make the promise binding, the plaintiff should have acted at the

(s) 1 Roll. Abr. 11, pl. 1; *Osborne v. Rogers*, 1 Wms. Saund. 264, n. (1).

(t) See *Lampleigh v. Brathwait*, Hob. 106.

(u) *Hunt v. Bate*, Dyer, 272; *Thornton v. Jenyns*, 1 M. & G. 188.

(x) 1 Roll. Abr. 11, (Q) pl. 6.

request of the defendant (y)." The distinction established by these cases shows the necessity of stating in declarations on promises subsequent to executed considerations, that they were done at the request of the party promising; for although, after verdict, the court will in some cases imply a request, yet after a judgment by default the omission has been held fatal (z).

In the above cases of voluntary courtesies the law implies no promise; any subsequent express promise, therefore, must depend upon its own terms. Where, however, the law implies a promise from an executed consideration, there no express promise differing from that which by law would be implied can be enforced (a). Thus where an action was brought on an account stated, from which the law implies a promise to pay on request only, it was held that the consideration was not sufficient to support a promise to pay at a future day (b). So where the declaration stated that the defendant agreed to let and the plaintiff to take a certain messuage and premises, &c., on certain terms, and that *afterwards*, in consideration of the premises and that the plaintiff at the request of the defendant had promised the defendant to perform his part of the agreement, the defendant promised the plaintiff to perform his part of the agreement, and that he then had power to let the messuage and premises *without restriction as to the purpose for which the same should be occupied*, it was held that no such promise could be implied from the relation between the parties, and that the consideration stated was insufficient to support it (c).

Moral Obligation, whether a good Consideration.—It was formerly held (d), that a moral obligation was *generally* a sufficient consideration for an express promise to pay. In a subsequent case, however (e), Lord *Tenterden* threw out that the above doctrine was one which should be received with some limitation. This opinion was assented to by the Court of Queen's Bench in *Monkman v. Shepherdson*, 11 A. & E. 415, and finally in *Eastwood v. Kenyon*, *ibid.* 438, after a full consideration of all the authorities, the above case, and with it the doctrine that a moral obligation is *generally* a sufficient consideration for an express promise to pay, was substantially overruled. In the latter case (of *Eastwood v. Kenyon*) the declaration stated that the defendant promised to repay to the plaintiff money laid out by him in the maintenance of an infant (who afterwards became the defendant's wife) and in the improve-

(y) *Per Tindal, C.J., Tipper v. Bicknell*, 3 B. N. C. 715.

(z) *Hays v. Warren*, Str. 933; *s. v. per Wilmot, J.*, in *Pillans v. Microp*, 3 Burr. 1671; and see now 15 & 16 Vict. c. 76, ss. 143, 144.

(a) *Per Tindal, C.J., in Kaye v. Dutton*,

2 D. & L. 296, 297; *Roscorla v. Thomas*, 3 Q. B. 234.

(b) *Hopkins v. Logan*, 5 M. & W. 241.

(c) *Jackson v. Cobbin*, 8 M. & W. 790.

(d) *Lee v. Muggridge*, 5 Taunt. 36.

(e) *Littlefield v. Shee*, 2 B. & Ad. 813.

ment of her land, and alleged that the defendant, in right of his wife, had received the benefit of all the monies so expended, and had agreed to his accounts, &c. ; but the court held it bad in arrest of judgment, for the consideration for it was past and executed long before, and was not laid to have been at the request of the defendant, nor even of his wife while sole (though if it had, the case of *Mitchinson v. Hewson* (*f*) shows that it would not have been sufficient), and the declaration really disclosed nothing but a benefit voluntarily conferred by the plaintiff and received by the defendant, with an express promise by the defendant to pay money.. So a subsequent promise will not operate so as to revive a *void* security (*g*). The case of *Watson v. Turner*, Bull. N. P. 147, where overseers were held bound by a subsequent promise to pay an apothecary's bill for care taken of a pauper, and which has sometimes been cited in support of the above doctrine, may be supported on strict legal principles, without resorting to the doctrine of moral obligation, of which not a trace can be found in the older cases, for the overseers are bound by law to provide for the poor, which, being a *legal* obligation, distinguishes the case. The defendants, being thus bound, derived a benefit from the act of the plaintiff, who afforded that assistance to the pauper, which it was the duty of the defendants to have provided; this was the consideration, and the subsequent promise by the defendants to pay for such assistance was evidence from which it might be inferred that the consideration was performed by the plaintiff, with the consent of the defendants, and consequently sufficient to support an *assumpsit* for work and labour performed by the plaintiff for the defendants, *at their request*.

The exceptions to the above rule are cases "of voidable contracts subsequently revived, of debts barred by operation of law subsequently revived, and of equitable and moral obligations which, but for some rule of law, would of themselves have been sufficient to raise an implied promise" (*h*). Hence, where the holder of a bill of exchange had failed in giving due notice of the dishonour of the bill to the drawer, it was adjudged that a subsequent promise by the drawer that he would see the bill paid would support an *assumpsit* (*i*). In like manner it has been held that a promise to pay a debt barred by the Statute of Limitations is good (*k*); a positive and precise promise (*l*) by a bankrupt after

(*f*) 7 T. R. 348.

(*g*) *Cockshott v. Bennett*, 2 T. R. 763.

(*h*) *Per Denman, C.J.*, in *Roscorla v. Thomas*, 3 Q.B., 237; and see cases reviewed in a note to *Wennall v. Adney*, 3 B. & P. 249; *Kaye v. Dutton*, 2 D. & L. 291; 13 L. J., C.P. 183.

(*i*) *Hopes v. Alder*, 6 East, 16, n.; *Rogers v. Stevens*, 2 T. R. 713; *Lundie v. Robertson*, 7 East, 231; *Haddock v. Bury*,

Middx. Sittings, T. 3 Geo. II. *per Raymond, C.J.*

(*k*) *Hyleing v. Hastings*, Lord Raym. 389. It must be in writing, signed, 9 Geo. IV. c. 14, s. 1.

(*l*) *Linbry v. Weightman*, 5 Esp. 198. The promise must be distinct and unequivocal, *per Lord Ellenborough, C.J.*, in *Fleming v. Haynes*, 1 Star. 370.

his certificate to pay an antecedent debt (*m*) was good until prohibited by statute (*n*): and a promise by a person of full age to pay a debt contracted during his infancy (if in writing and signed, 9 Geo. IV. c. 14, s. 5), is binding (*o*). If the subsequent promise be conditional, it is incumbent on the plaintiff to show the condition performed; thus, formerly, if a bankrupt, after obtaining his certificate, promised to pay a prior debt when he should be able, the plaintiff has to prove the ability of the defendant to pay at the time of the action brought on the subsequent promise (*p*).

Although in the instances given *ante*, p. 65, a moral obligation has been held to be a good consideration for an express promise, it has never been carried further, so as to raise an implied promise in law. Hence, where the parish officers of A. laid out money in providing medical assistance and other necessities for a pauper, who was taken suddenly ill in the parish, and could not be removed in consequence of his illness, it was held, that the law would not raise an implied promise in the parish of B. in which the pauper was legally settled, to reimburse the money laid out by the parish of A., although the parish of B. had notice of the pauper's illness (*s*). An accident happened to a driver of a waggon belonging to I. S., in the parish of A.; the man was immediately removed to the nearest public-house, which was in the parish of B., where the plaintiff attended him as a surgeon; the parish officer of B. visited the place, and did not discharge the plaintiff; it was held, that he was liable to pay the plaintiff for his attendance, the removal being *bond fide* (*t*). *Note*.—The plaintiff was in the habit of attending the parish poor of B.; and as the defendant did not repudiate the plaintiff's attendance, he did what was equivalent to a previous request. Moreover, the pauper lying sick, as casual poor, in the parish, there was a legal obligation on the parish to look to the supply of his necessities.

A master is not liable upon an implied assumpsit to pay for medical attendance on a servant, who has met with an accident in his service (*u*).

An action on the case does not lie for the recovery of expenses arising from a moral obligation to do a thing which the law does not compel; as for the expenses arising from the pregnancy of a daughter debauched; to maintain an action for that injury, there must be a loss of service (*x*). See *post*, tit. "Master and Servant,"

(*m*) *Trueman v. Fenton*, Cowp. 544; but see *post*, tit. "Bankrupt."

(*n*) 12 & 13 Vict. c. 106, s. 204.

(*o*) *Southerton v. Whitlock*, 1 Str. 690, *per Raymond*, C.J.

(*p*) *Besford v. Saunders*, 2 H. Bl. 116.

(*s*) *Atkins v. Banwell*, 2 East, 505. Such expenses are now recoverable

under 4 & 5 W. IV. c. 76, s. 84.

(*t*) *Lamb v. Bunce*, 4 M. & S. 275. See *Tomlinson v. Bentall*, 5 B. & C. 738; *Wing v. Mill*, 1 B. & Ald. 104.

(*u*) *Wennall v. Adney*, 3 B. & P. 247.

(*x*) *Satterthwaite v. Dewhurst*, B. R. E. 25 Geo. III. A. P. B. No. 85; *Dampier*, MSS. L. I. L.

But the maintenance of an illegitimate child by its mother is a sufficient consideration for a promise by the reputed father to pay an annuity to her; for he might have had the child affiliated on him (y). The moral obligation which a father is under to provide for his child, imposes on him no liability to pay the debts incurred by the child; and he is not so liable unless he has given the child authority to incur them, or has expressly contracted to pay them (z).

The Agreement must be Legal.—In order to maintain an assumpsit, the agreement must be legal; that is, it must not contravene any rule of the common law, the express provisions of any statute (a), or the general policy of the law. The two essential parts in every parol agreement are the consideration and the promise. If either of these be illegal, or if part of the entire consideration be illegal (b), or if the promise be to do two or more acts, one of which is illegal (c), an action cannot be maintained for a breach of the agreement. Hence, where the consideration was, that the plaintiff would procure the defendant to be presented and instituted to a chapel, it was adjudged illegal, on the ground of its being simony, and therefore incapable of supporting an assumpsit (d). So where defendant, an under-sheriff, having seized the goods of J. S. under an *elegit* sued out by the plaintiff, in consideration that the plaintiff, at the request of the defendant, would sue out another writ of *elegit*, and authorize some person to receive the goods, promised to procure the goods to be found by an inquisition, and to deliver them to the person authorized; the court were of opinion that the promise was illegal: 1. Because the seizing the goods under the first *elegit* was ill, for want of an inquisition, and it differed from a *fi. fa.*, so that the defendant was a trespasser *ab initio*, and this promise was to make good his own wrong: 2. It was the duty of the sheriff to return the jury, who ought to be impartial; but this promise bound him contrary to the duty of his office, and although one part of the promise was legal, yet that depending on the illegal part vitiated the whole (e). So where a person promised to indemnify a gaoler, if he would permit a prisoner to escape out of execution, it was adjudged, that an action could not be maintained for a breach of the promise, because the consideration, namely, the suffering a prisoner in execution to escape, was against law (f). So where, in consideration that the plaintiff at the request of the defendant had published a libel

(y) *Jennings v. Brown*, 9 M. & W. 496.

(z) *Mortimore v. Wright*, 6 M. & W. 482.

(a) *Featherstone v. Hutchins*, 3 Leon. 222; Cro. Eliz. 199.

(b) Cro. Jac. 103.

(c) T. Jones, 24.

(d) *Mackaller v. Todderick*, Cro. Car. 361.

(e) *Morris v. Chapman*, T. Jones, 24; Carter, 223, S. C.

(f) *Martin v. Blithman*, Yelv. 197. See also *Sherley v. Packer*, 1 Roll. 313.

against a third person, and had consented to defend an action brought against him for such publication, the defendant promised to indemnify the plaintiff against all costs and expenses incurred thereby; it was held that the consideration was illegal, and that if that objection could be got rid of, and the consideration rejected as surplusage, the promise was one by a stranger to the action, and therefore void for maintenance (*g*). So where an attorney entered into an agreement in France (where such agreements were legal) with a French subject, to sue for a debt due to the latter from a person residing in England, whereby the attorney was to obtain by way of recompense a moiety of the amount recovered, it was held that the agreement was void for champerty; but as the work had been done, and the client had received the benefit of it, the attorney was entitled to his costs as between attorney and client (*h*).

If an officer permit a prisoner to go at large, in consequence of which he (the officer) is obliged to pay the creditor, the officer cannot maintain an action for money paid against the debtor, for he cannot raise a cause of action against the debtor by a payment of money for him caused by his own breach of duty (*i*). But where an officer discharged a prisoner arrested on *mesne process*, on payment of the sum sworn to and costs, and was afterwards obliged to pay the residue of the debt, it was held by *Buller, J.*, that as the officer had not been guilty of any improper conduct, and as he was by law compellable to pay the *whole* debt, he was entitled to recover against the defendant for so much money paid to his use (*k*).

It is not an offence against the law of nations or the law of this country for the subject of a neutral state to supply contraband of war to a belligerent power; and the right of the other belligerent to seize such contraband of war *in transitu*, is merely a co-existent conflicting right which exposes the neutral merchant to the risk of confiscation, but does not render illegal a contract between him and another neutral subject for a joint adventure for the supply of such contraband goods (*l*).

Of Agreements in Restraint of Trade.—“The general rule is, that all restraints of trade (which the law so much favours), if nothing more appears, are bad. This is the rule which is laid down in the famous case of *Mitchel v. Reynolds*, 1 P. Wms. 181 (in which all the cases and arguments in relation to this matter are thoroughly weighed and considered). But to this general rule there are some

(*g*) *Shackell v. Rosier*, 2 B. N. C. 634.

(*h*) *Grell v. Levy*, 16 C. B. (N. S.) 73.

(*i*) *Pitcher v. Bailey*, 8 East, 171.

(*k*) *Cordron v. Lord Masserene*, Peake's N. P. C. 143.

(*l*) *Per Lord Chancellor Westbury, Ex parte Charvasse*, 34 L. J. Bank. 17. See also *The Helen*, 35 L. J. Adm. 2, and *Hobbs v. Hemming*, 17 C. B. N. S. 791.

exceptions, as first, that if the restraint be only particular in respect to the time and place, and there be a good consideration given to the person restrained, a contract or agreement upon such consideration, so restraining a particular person, may be good and valid in law, notwithstanding the general rule, and this was the very case of *Mitchel v. Reynolds*" (m). Thus a promise not to use a trade in a particular place is valid (n). So a contract entered into by an attorney, that he would relinquish and make over to B. and G., two other attorneys, his business so far as respected his practice in the profession within London, and 150 miles from thence, and all his business as agent, &c., and that he would recommend his clients and permit B. and G. to use his name in the business, has been held good (o). The limit of exclusion depends upon the character of the business, and it will not be considered unreasonable, as in restraint of trade, if it was necessary for the protection of the purchase (p).

Of Agreements contrary to public Policy.—The defendant in consideration that the plaintiff, who was master-joiner in one of the Royal dockyards, would procure himself to be superannuated, undertook, in case he, defendant, should succeed the plaintiff as master-joiner, to allow him the extra pay from the yard books. This agreement having been made without the knowledge of the navy board, to whom the appointment belonged, was held void, on the ground that it was contrary to public policy (q). So where A., through the interest of B., was appointed to the office of customer of Carlisle, having previously signed an agreement that his name was made use of in trust for B., and that he would appoint such deputies as B. should nominate, and would empower B. to receive the fees of the office to his own use, this agreement was held void; first, as being against the principles of the common law, inasmuch as the public was abused and the king deceived; and, secondly, because the agreement was in violation of the 12 Rich. II. c. 2, and 5 & 6 Edw. VI. c. 16, which were made to guard against evils of this nature (r). On the same ground, it was held, that upon an agreement for the sale (by the owner) of the command of a ship in the service of the East India Company,

(m) *Per Willes, C. J., in the Master, &c., of Gunmakers v. Fell*, Willes, 388. See also *Hartley v. Cummings*, 5 C. B. 247; *post*, tit. "Debt." Exclusive rights of trading in towns were abolished by 5 & 6 Will. IV. c. 76, s. 14.

(n) *Broad v. Jollyffe*, Cro. Jac. 596.

(o) *Bunn v. Guy*, 4 East, 190.

(p) *Harms v. Parsons*, 32 L. J. Chan. 247.

(q) *Parsons v. Thompson*, 1 H. Bl. 322.

(r) *Garforth v. Fearon*, 1 H. Bl. 327.

And see *Hopkins v. Prescott*, 4 C. B. 578. With respect to offices under government not mentioned in any statute, it has been decided, that they cannot be sold. But there are some offices which may be the subject of sale, if the sale takes place under the authority and with the consent of those who have the power of appointment, as commissions in the army, &c. *Per Kenyon, C.J., and Lawrence, J., 8 T. R. 92, 94.*

made without the knowledge and against the bye-laws of the company, an action could not be maintained (s).

A promise was made by the defendant, a friend of a bankrupt, when he was on his last examination, that in consideration that the assignees and commissioners would forbear to examine the bankrupt concerning certain sums of money with which he was charged, he, defendant, would pay those sums; the consideration was held void, being contrary to the policy of the bankrupt laws (t). The assignees cannot legally enter into any contract with a particular creditor, that on a certain event he shall receive out of the estate the full amount of any debt. It is the duty of the assignees to make an equal distribution of the effects among the creditors, in proportion to all the debts of the bankrupt (u). An agreement by the payee of a bill of exchange to discharge a person liable upon it, in consideration that the latter would not move the Court of Queen's Bench against him (the payee) for a misdemeanor, is illegal (x). But it seems, that in cases of misdemeanor, where the party aggrieved is also entitled to an action for damages, *e. g.*, in the case of a nuisance or assault, he may compromise or settle his private damage in any way he may think fit (y).

So where, a petition having been presented to the House of Commons against the return of a member on the ground of bribery, the petitioner entered into an agreement, in consideration of a sum of money, and upon other terms, to proceed no further with the petition; it was held that this agreement was illegal (z). *Note.*—In this case it was determined that the agreement was admissible in evidence, for the purpose of insisting on the illegality of the transaction, without being stamped, and that a stamp is unnecessary where the instrument shows no contract in law, and cannot be enforced between the parties (a).

A number of bleachers in the county of Lancaster, finding that losses to a considerable amount had been incurred by them from their not being entitled to retain goods, put into their hands, for a general balance, came to an agreement that they would not receive the goods of any person, who would not consent that they should be retained for a general balance that might happen to be due to them. This agreement came to the knowledge of J. S., who afterwards sent a quantity of goods to A., one of these bleachers, for the purpose of being bleached. J. S. became a bankrupt. The assignees demanded the goods, but the bleacher insisted that he

(s) *Blackford v. Preston*, 8 T. R. 89.
See *Stackpole v. Earle*, 2 Wils. 133. If the company consents, see *Richardson v. Mellish*, 2 Bing. 229.

(t) *Nerot v. Wallace*, 3 T. R. 17.

(u) *Staines v. Wainwright*, 6 B. N. C. 174.

(x) *Pool v. Bousfield*, 1 Campb. 55.

(y) *Keir v. Leeman*, 9 Q. B. 371; *R. v. Blakemore*, 14 *ibid.* 544.

(z) *Coppock v. Bower*, 4 M. & W. 361.

(a) So of an unstamped cheque, *Keable v. Payne*, 8 A. & E. 555; and see *Holmes v. Sixsmith*, 7 Exch. 802.

had a lien on the goods for what remained due to him for his work and labour upon other goods delivered to the bankrupt before the bankruptcy. It was contended, on the part of the assignees, that the object of the agreement was to create a lien in cases where none existed before; and though an individual might impose such terms on his customers, yet it was not competent to a class of men to do it; and that it was against public policy to permit combinations of this sort to avail. But the court were of opinion, that as the convenience of commerce and natural justice were on the side of liens, the agreement was legal, its object being merely to enforce that which the law considered as equitable; more especially as it was made by persons who had an option either to work for this or that person as they chose (*b*).

A contract for the sale of goods, to be delivered at a future day, is not invalidated by the circumstance that, at the time of the contract, the vendor neither has the goods in his possession, nor has entered into any contract to buy them, nor has any reasonable expectation of becoming possessed of them, by the time appointed for delivering them, otherwise than by purchasing them after making the contract; for such a contract does not amount to a wager, inasmuch as both the contracting parties are not cognisant of the fact that the goods are not in the vendor's possession; and even if it were a wager, it is not illegal, because it has no necessary tendency to injure third parties (*c*).

A contract in restraint of marriage generally is illegal, as being against the sound policy of the law (*d*). *Aliter*, if the restriction be confined to a particular nation, *e. g.* a Scotchman (*e*), and limitations *durante viduitate* are valid (*f*).

Of Agreements in contravention of Statutes.—"It is perfectly settled, that where the contract which the plaintiff seeks to enforce, be it express or implied, is expressly or by implication forbidden by the common or statute law, no court will lend its assistance to give it effect. It is equally clear, that a contract is void, if prohibited by a statute, though the statute inflicts a penalty only, because such a penalty implies a prohibition; Lord *Holt*, *Bartlett v. Vinor* (*g*). And it may be safely laid down, that if the contract be rendered illegal, it can make no difference in point of law, whether the statute, which makes it so, has in view the protection of the revenue or any other object. The sole ques-

(*b*) *Kirkman v. Shawcross*, 6 T. R. 14.

(*c*) *Hibblewhite v. M'Morine*, 5 M. & W. 462; *Mortimer v. M'Callan*, 6 M. & W. 76; *S. C.* in error, 9 M. & W. 636.

(*d*) *Hartley v. Rice*, 10 East, 22; *post*,

tit. "Wager."

(*e*) *Perrin v. Lyon*, 9 East, 170; *Randall v. Payne*, 1 Bro. C. C. 55.

(*f*) *Lloyd v. Lloyd*, 21 L. J., Ch. 596.

(*g*) *Carth.* 252.

tion is, *whether the statute means to prohibit the contract*" (h). Hence, where an agreement was made between two parties, subjects of this country, and one of whom was resident in Guernsey, for the sale and delivery of goods in Guernsey, for the purpose of being smuggled into England; it was held, that the vendor could not maintain an action for the value of the goods (i). So where the vendor was concerned in giving assistance to the vendee in smuggling the goods, by packing them in the manner most suitable for, and with the intent to aid, that purpose, although the vendor was a foreigner, resident abroad, and the sale and delivery of the goods were completed abroad, it was held, that the vendor could not resort to the laws of this country to give effect to his agreement (k). The mere knowledge of the vendor, however, that the goods were purchased for the purpose of being smuggled, is not sufficient to prevent his recovering in an action for the price of the goods, if the vendor was a foreigner resident abroad, and the sale and delivery were completed abroad (l). A druggist, after the passing of 42 Geo. III. c. 38, which forbade any person from procuring to be mixed or compounded any liquor to imitate beer from any other ingredient but malt and hops, brought an action against the defendants, brewers, for the price of certain drugs which he had sold to them, knowing that they were to be used in the brewery: it was held that he was not entitled to recover (m).

A contract, *e. g.* a bill of exchange, with an association of which spiritual persons are members, contrary to 57 Geo. III. c. 99, s. 3, was held void (n), but such contracts are now legalised by 4 & 5 Vict. c. 14.

It was formerly held that when acts had been passed containing *regulations* as to articles which are the subject of sale, and when the policy of the act was for the security of the buyer and to protect him from the frauds of the seller (o), the seller could not recover the price, unless he observed the regulations, or unless (*semble*) they had been expressly waived by the buyer; but that it was otherwise if the act was passed for the protection of the revenue only (p), but here again the true rule is not whether the act was passed to protect the buyer or the revenue, but whether the legislature intended to prohibit the contract if unaccompanied

(h) *Per Parke, B., Cope v. Rowlands*, 2 M. & W. 157; and see *Taylor v. Crowland Gas Company*, 10 Exch. 293.

(i) *Biggs v. Lawrence*, 3 T. R. 454; *Clugas v. Penahuna*, 4 T. R. 467.

(k) *Waymell v. Reed*, 5 T. R. 599.

(l) *Holman v. Johnson*, Cowp. 341.

(m) *Layton v. Hughes*, 1 M. & S. 592.

(n) *Hall v. Franklin*, 3 M. & W. 259.

(o) *Law v. Hodson*, 11 East. 300. *Cundell v. Dawson*, 4 C. B. 376, as to coals. *Forster v. Taylor*, 5 B. & Ad. 887; 3 N. & M. 244, as to firkins of butter. *Tyson v. Thomas*, M'Clel. & Y. 119, as to barley sold by Hobbett, (local measures are now allowed within certain limitation, 5 & 6 W. IV. c. 63, s. 6).

(p) *Brown v. Duncan*, 10 B. & C. 93.

by certain formalities or not (*q*). In these cases, although a penalty be imposed in the same clause of the act which requires a thing to be done, yet the remedy of the public is not thereby limited to a proceeding for the penalty, but the clause may be used as a defence to an action (*r*). Thus a printer cannot recover for work and materials expended in printing a book, if he has not printed his name and place of abode on the first and last leaves, in accordance with the 39 Geo. III. c. 79, s. 27 (*s*). An opera singer cannot recover on a bill of exchange accepted in discharge of a debt due for performances, &c., at a theatre not duly licensed (*t*). A person not duly qualified according to the 44 Geo. III. c. 98, s. 14, cannot recover for work and labour in drawing conveyances of real and personal estate, &c. (*u*). Nor an unlicensed person for surgical operations, medicines, &c. (*x*). Nor a London broker for commission, &c., unless duly licensed (*y*).

Where, on the other hand, the intention of the statute is not to prohibit the contract, the plaintiff is entitled to recover. Thus (*z*), where the permit delivered by the seller, a distiller, to the buyer, did not truly specify the strength of the spirits sold in accordance with 6 Geo. IV. c. 80, s. 124 (*a*); where the plaintiff, a distiller, sold spirituous liquors to the defendant, who to his knowledge carried on the business both of a rectifier and retailer of spirits, contrary to the 26 Geo. III. c. 73, s. 64 (*b*); where one of the five plaintiffs, who were in partnership together as distillers, carried on a retail spirit business within two miles of the distillery, contrary to the 4 Geo. IV. c. 94, ss. 132, 133 (*c*); where the plaintiffs, dealers in tobacco, had not painted their names over their premises in accordance with the 6 Geo. IV. c. 81, s. 25; in all which cases, the court held, that the provisions of the different statutes were in the nature of excise regulations, and their intention, the protection of the revenue by the imposition of a penalty, but not the prohibition of the contract.

Where an action was brought for the price of stock sold and transferred by the plaintiff to the defendant, and the defendant pleaded that the stock was transferred by virtue of an agreement with the plaintiff for the transfer of the same, and that, at the time of the agreement for the sale, the plaintiff was not actually

(*q*) *Taylor v. Crowland Gas Company*, 10 Ex. 293.

(*r*) *Forsler v. Taylor*, 5 B. & Ad. 887.

(*s*) *Bensley v. Bignold*, 5 B. & Ald. 355.

(*t*) *De Begnis v. Armistead*, 10 Bingh. 107; *Levy v. Yates*, 8 A. & E. 129.

(*u*) *Taylor v. Crowland Gas and Coke Company*, 10 Exch. 293.

(*x*) *Grenaire v. Valon*, 2 Campb. 144; *Cope v. Rowlands*, 2 M. & W. 159. See

now 21 & 22 Vict. c. 90, s. 32.

(*y*) *Cope v. Rowlands*, *supra*; *Smith v. Lindo*, 27 L. J., C. P. 196.

(*z*) *Wetherell v. Jones*, 3 B. & Ad. 225; *acc. Johnson v. Hudson*, 11 East, 180; but see 2 Will. IV. c. 16, s. 12.

(*a*) *Hodgson v. Temple*, 5 Taunt. 181.

(*b*) *Brown v. Duncan*, 10 B. & C. 98.

(*c*) *Smith v. Mawhood*, 14 M. & W. 452.

possessed of or entitled to the stock, and therefore that the contract was void by the provisions of the 7 Geo. II. c. 8, s. 8; it was held, that the plea was no answer to the action, for that, the executed consideration declared on being legal, though the transaction in its inception might have been illegal, the plaintiff was entitled to recover (*d*).

By 24 Geo. II. c. 40, s. 12, it is enacted, "that no person shall maintain any action for any debt or demand, for any spirituous liquors, unless such debt has been *bond fide* contracted at one time, to the amount of 20s. or upwards; nor shall any item in any account for distilled spirituous liquors be allowed, where the liquors delivered at one time, and mentioned in such item, shall not amount to 20s. at the least, without fraud; and where no part of the liquors sold or delivered shall have been returned or agreed to be returned directly or indirectly," &c.

In assumpsit for goods sold and delivered, it appeared that the defendant had run up a score for grog, beer, and herrings, consumed by him at a public house kept by the plaintiff. It was objected, that the demand for the grog could not be sustained, being illegal within the preceding statute. *Thomson*, B., was of this opinion, observing, however, that the statute was confined to spirituous liquors. The plaintiff recovered for the residue of his demand (*e*). The above statute extends to bills of exchange, part of the consideration for which are spirituous liquors sold in less quantities than 20s. value (*f*); although the contrary was held by Lord *Ellenborough* in a case at *Nisi Prius* (*g*).

It was at one time thought, that this statute did not apply to cases where the spirituous liquors were sold in less quantities than 20s. by a spirit merchant to the keeper of an eating-house for consumption by the customers of the latter as they required it (*h*), and Lord *Abinger* (*i*) expressed an opinion, that this enactment did not apply to cases where spirits are supplied by an inn-keeper to guests who are lodging in the house. But it has been since held (*k*), that this section contains an unqualified prohibition of the sale of spirituous liquors to a smaller amount than 20s. at a time: and that the price of spirits sold in quantities less than the required amount, by a spirit-merchant to a publican, to be consumed, not by the publican himself, but by his customers, cannot be recovered in an action.

But where parties, having cross-demands, balance and settle

(*d*) *M'Callan v. Mortimer*, 9 M. & W. 636 (Exch. Ch.).

(*e*) *Gilpin v. Rendle*, Devonshire Lent Ass. 1809, MS.

(*f*) *Scott v. Gilmore*, 3 Taunt. 226.

(*g*) *Spencer v. Smith*, 3 Campb. 9.

(*h*) *Jackson v. Attrill*, Peake's N.P.C. 180.

(*i*) *Proctor v. Nicholson*, 7 C. & P. 69.

(*k*) *Hughes v. Done*, 1 Q. B. 294.

their accounts, it is no defence to an action brought for the balance that part of the amount was for spirits delivered in quantities under 20s. in value (*l*). Where a payment is made generally on account, and no specific direction as to its application is given, the creditor may apply it to such portion of his claim as consists of spirits supplied under the value of 20s. (*m*).

By 30 & 31 Vict. c. 142, s. 4 (*n*), it is enacted "That no action shall be maintainable to recover any debt alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry, consumed on the premises."

Of Fraudulent Agreements.—The agreement must be fair and honest, and not entered into for a fraudulent purpose; for fraudulent contracts are considered in the same light as illegal contracts, and consequently an action cannot be maintained for the breach of them. The defendants being indebted to the plaintiffs and other creditors, and being insolvent, assigned all their effects in trust to pay 11s. in the pound to their creditors, to which all the creditors consented, and signed the deed of trust, except the plaintiffs, who refused to sign and to take any composition, unless the defendants would give them a note for the remaining 9s. in the pound; the defendants accordingly gave a note to that amount, whereupon the plaintiffs signed the deed. It appeared, that if the plaintiffs had not signed, the rest of the creditors would not have signed the deed. An action having been brought on the note, a verdict was found for the defendants: and on an application made to the court for a new trial, it was refused, Lord *Kenyon*, C.J., observing, that the foundation of his opinion was, "that the temptation to give this note was a fraud on the creditors who were parties to the contract, on which their debts were to be cancelled in consideration of receiving a composition. The note preceded the execution of the deed; all the creditors being assembled for the purpose of arranging the defendants' affairs, they all undertook and mutually contracted with each other, that the defendants should be discharged from their debts after the execution of the deed. Then the plaintiffs, in fraud of that engagement, entered into a contract with the defendants, which prevented their being put into that situation which was the inducement to the other creditors to sign the deed, and to relinquish a part of their demands" (*o*). So where a trust deed was proposed to the creditors of an insolvent, whereby they all engaged to accept payment of their debts by six instalments, the second, third and fourth of which were to be guaranteed by collateral security, and the fifth

(*l*) *Dawson v. Remmant*, 6 Esp. 24.

(*m*) *Philpott v. Jones*, 2 A. & E. 41.
Secus, if the contract is *forbidden* by law.
Wright v. Laing, 3 B. & C. 169.

(*n*) The County Court Act of 1867.

(*o*) *Cockshott v. Bennett*, 2 T. R. 763;
 and see *Middleton v. Lord Onslow*, 1 P.
 Wms. 768, *post*, "Money had and received."

and sixth were to remain on the single security of the insolvent; several of the creditors refused to sign, unless the plaintiffs did: in order to induce the plaintiffs to sign the deed, the defendant, at the instance of the insolvent, agreed that he (the defendant) would procure the plaintiffs a collateral security for the fifth and sixth instalments within a given time, whereupon the plaintiffs signed the trust deed, and the other creditors, who had before refused, signed also, but *without any knowledge* of the agreement between the plaintiffs and defendant: an action having been brought for the non-performance of this agreement, it was held to be a void agreement, on the ground that it was a fraud against the other creditors: and although, in this case, the stipulation by the plaintiffs was for a further security, and not for more money, there was not any difference, in substance, whether a creditor stipulated for that, which he thought would produce him money more certainly, or for a larger sum than he had agreed to take in common with the other creditors; that it was equally a fraud upon the other creditors to stipulate for either (*p*).

So where the plaintiff, before signing a composition deed, by which the creditors of the defendant agreed to take a composition, payable partly by instalments and secured by the defendant's promissory notes, stipulated, without their knowledge, for a bill of exchange, to be indorsed to him by the defendant for a further sum, it was held, that the whole agreement between the plaintiff and the defendant was void, as being a fraud upon the other creditors, and that the plaintiff could not recover, even upon the defendant's notes, for the amount of the composition-money, although he had received nothing on the bill indorsed to him by the defendant (*q*). So where the plaintiff refused to sign a composition deed, unless the defendants would pay him dividends at a rate exceeding that which the other creditors had accepted, and the defendants agreed to this, and, as an inducement to him to make the contract, stated that no other creditor had received a similar preference, a statement which was false within the knowledge of the defendants, it was held, that this deception of the plaintiff by the defendants was no answer to the defendants' plea of release under the composition deed, for "as the plaintiff was himself, in the transaction of the composition and release, guilty of fraud in respect of the other compounding creditors, in stipulating for a preference to himself, he is not at liberty to insist on the fraud at the same time practised on himself" (*r*).

The creditors of a bankrupt entered into a deed of composition to receive eight shillings in the pound in full discharge of their

(*p*) *Leicester v. Rose*, 4 East, 372; and see *Ex parte Sadler*, 15 Ves. 52; *Cullingworth v. Loyd*, 2 Beav. 391.

(*q*) *Howden v. Haigh*, 11 A. & E. 1033.

See *Higgins v. Pitt*, 4 Exch. 323.

(*r*) *Mallalieu v. Hodgson*, 16 Q. B. 689, *per Coleridge and Erle, JJ.*, *Wightman, J.*, diss.

debts, and agreed to release every thing beyond that, and *give up all securities to the bankrupt*, and join in a petition to the chancellor to supersede the commission; one of the creditors, having two distinct debts due from the bankrupt, for one of which he held bills to the full amount, received his dividend of eight shillings in the pound on both debts, and then received the full value of some of the bills; it was held, that the bankrupt was entitled to sue for the money so obtained on the bills in an action for money had and received (*s*). But where the creditors of an insolvent agreed, by an instrument (not under seal), that they would accept in full satisfaction of their debts twelve shillings in the pound, payable by instalments, and would release him from all demands: and one of the creditors, who signed for the whole amount of his debt, held at the time, as a security for part, a bill of exchange drawn by the debtor, and accepted by a third person; the money due on his bill having afterwards been paid by the acceptor, and an allowance made by the creditor to the insolvent of the excess of the composition-money he had received, it was held, that the creditor might retain the money he had received for the bill, the agreement of composition not containing any express stipulation for giving up securities, nor anything whence such a stipulation could be implied, and the effect of it not being to extinguish the original debt (*t*).

Where, however, the debt is actually released by the composition deed, the creditor has not any right to hold any collateral security which may have been deposited with him; neither can he make the giving up such a security a consideration for a promise by the debtor to pay the residue of the debt, beyond the amount of the composition received under the deed (*u*). Where defendant entered into a composition to pay his creditors 6s. 8d. in the pound, upon condition of being released, and *nearly two years afterwards* gave one of the creditors, who had agreed to sign the composition, a bond for the residue of her debt, she not having received the amount of her composition, although divers creditors had signed the deed, received their composition and released the defendant; it was held, that the bond was good: for that, as it was not given or agreed to be given *at the time of the composition*, it was not a fraud on the other creditors (*v*).

Where A. gave B. a sum of money for goods in advancement of C., a secret agreement between B. and C., that C. should pay B. a further sum for the goods, was held void on the ground that it was a fraud upon A. (*w*). So where it was agreed between the vendors and the vendee of goods, that the vendee should pay 10s. per ton beyond the market price, which sum was to be applied

(*s*) *Stock v. Marston*, 1 B. & P. 286.

(*t*) *Thomas v. Courtney*, 1 B. & Ald. 1.

(*u*) *Cowper v. Green*, 7 M. & W. 633.

(*v*) *Took v. Truck*, 4 Bingh. 224.

(*w*) *Jackson v. Duchaire*, 3 T. R. 551.

in liquidation of an old debt due to one of the vendors, and the payment of the goods was guaranteed by a third person, to whom the bargain between the parties was not communicated, it was held, that this was a fraud and rendered the guarantee void (*x*).

To assumpsit for the non-performance of a written agreement to take a furnished house, the defendant pleaded that the plaintiff procured the defendant to enter into the agreement by means of fraud, covin, and misrepresentation; on which issue was joined. It appeared at the trial, that the plaintiff had employed an agent to let the house in question, and the defendant, being in treaty with the agent for taking it, asked him, "If there was any objection to the house?" to which he answered that there was not: the defendant signed the agreement, but afterwards discovered that the adjoining house was a brothel, and on that ground declined to fulfil the contract. It appeared that the principal knew of the existence of the brothel, but that the agent did not, and that he was not authorized to make the statement. It was held, that it was not sufficient to support the plea, that the representation turned out to be untrue, but that for that purpose it ought to have been proved to have been fraudulently made; that as the representation was not embodied in the contract, the contract could not be affected by it unless it were a fraudulent misrepresentation (*y*). And this principle, viz., that to avoid a contract on the ground of a misrepresentation collateral to and not part of the contract itself (*z*), there must be fraud (*a*), *i. e.* the representation must be untrue in fact, and the representer must know (or believe) it to be untrue, or, in other words, that a misrepresentation inadvertently made does not constitute legal fraud (*b*), has after much discussion in the courts been finally settled (*c*). In *Taylor v.*

(*x*) *Pidcock v. Bishop*, 3 B. & C. 605; *North British Insurance Company v. Lloyd*, 10 Exch. 523.

(*y*) *Cornfoot v. Fowke*, 6 M. & W. 358, Lord Abinger, C.B., diss.

(*z*) *Aliter*, if it is, as in cases of insurance and the like; *Moens v. Heyworth*, 10 M. & W. 157.

(*a*) *Knowledge* of the untruth is, it seems, *conclusive* evidence of fraud, although there is an absence of corrupt intention; *Polhill v. Walter*, 3 B. & Ad. 114; *Foster v. Charles*, 6 Bing.

(*b*) *Brunswick and Canada Railway Company v. Coningbean*, 31 L. J. Ch. 597, H. of L.

(*c*) *Wilson v. Fuller*, 3 Q. B. 68 and 1009; *Collins v. Evans*, 5 Id. 820; *Ormerod v. Huth*, 14 M. & W. 851 (all cases in Cam. Scacc.) It is to be observed, that besides the principle above men-

tioned, the case of *Cornfoot v. Fowke*, decided that the facts there disclosed were not sufficient to bring the case within it, for that neither the principal nor the agent committed a fraud,—“the principal, because, though he knew the fact, he was not cognizant of the misrepresentation being made nor ever directed the agent to make it; and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bond fide*.” It can scarcely be considered as settled even now that the fraud and the statement need be those of the same individual. See on this point, *per Campbell, C.J., Wilde v. Gibson*, 1 H. of L. C. 634; 2 Smith’s L. C. 71 b; *Bartlett v. Salmon*, 6 De Gex, Mac. & G. 33, 39, 40. See, too, the observations of Lord St. Leonards in the *National Ex-*

Ashton (d), this principle was carried somewhat further, and it was held, that it was not necessary to show that the party making the representation *knew* it to be untrue; but that it was sufficient if the representation was made for a fraudulent or deceitful purpose (e), and the representer did not know it to be true, or, it seems, had no reasonable and well-grounded belief of its truth (f).

Of immoral Agreements.—If the agreement be of such a nature, that the carrying it into effect, and enforcing it, will give a sanction and encouragement to immorality, an action cannot be maintained for the violation of it. This position is founded on the maxim, *ex turpi causâ non oritur actio*, or, in the elegant paraphrase of Lord *Mansfield*, justice must be drawn from pure fountains.

In an action for the use and occupation of a lodging, where it appeared that the lodging was let to the defendant for the purposes of prostitution, and with a knowledge on the part of the plaintiff of that fact, it was held, that the action was not maintainable (g). So where an action was brought against the defendant for board and lodging, and it appeared in evidence, that the defendant was a lady of easy virtue, that she had boarded and lodged with the plaintiff, who had kept a house of ill fame, and who, besides what she received for the board and lodging of the unfortunate women in her house, partook of the profits of their prostitution; Lord *Kenyon*, C.J., was of opinion, that such a demand could not be heard in a court of justice (h). On the same principle it was held, that an assumpsit would not lie to recover the value of prints of an immoral (or libellous) tendency, which had been sold by the plaintiff to the defendant (i). If a person lets lodgings to an immodest woman, to enable her to consort with the other sex, he cannot recover for the lodgings so supplied, but if the woman merely lodges there and receives her visitors elsewhere, he may (k). But in an action to recover the amount of a bill for washing done by the wife of the plaintiff, where it appeared in evidence, that the defendant was a prostitute, and that the articles washed consisted principally of expensive dresses, in which the defendant appeared at public places, and of gentlemen's night-caps, which were worn by the persons who slept with the defendant; with all which cir-

change Company v. Drew, 2 Macq., H. of L. 145; he seems not to assent to the first proposition of *Cornfoot v. Fowke*.

(d) 11 M. & W. 401; see *Freeman v. Baker*, 5 B. & Ad. 801.

(e) *i.e.* (*semble*) for the purpose of inducing a person to do what he otherwise would not have done.

(f) *Shrewsbury v. Blount*, 2 M. & G. 475; *Hayward v. Creasy*, 2 East, 92.

(g) *Crisp v. Churchill*, C. B. E. 34 Geo. III. *Per Eyre*, C.J.; *Acc. Girarday v. Richardson*, 1 Esp. 13.

(h) *Howard v. Hodges*, Middlesex Sittings, B. R. 2 Dec. 1796; *Jennings v. Throgmorton*, R. & M. 251.

(i) *Per Lawrence*, J., 4 Esp. 97.

(k) *Appleton v. Campbell*, 2 C. & P. 347; *Girarday v. Richardson*, 1 Esp. Cas. 13.

circumstances the plaintiff was acquainted; it was held, that the use to which the defendant applied the linen could not affect the contract, and that the plaintiff was entitled to recover (l). The same doctrine was laid down by Lord *Ellenborough*, in *Bowry v. Beninet*, 1 Campb. 348, where an action was brought against a prostitute to recover the value of some clothes which had been furnished by the plaintiff. The Chief Justice said, that the mere circumstance of the defendant being a prostitute, within the knowledge of the plaintiff, would not render the contract illegal; in order to defeat the action, it must be shown that the plaintiff expected to be paid out of the profits of the defendant's prostitution, and that he had sold her the clothes in order to carry it on. But this doctrine is now overruled, and the law was thus stated by *Pollock*, C.B., in a case in which the defendant, a prostitute, was sued for the hire of a brougham, and in which the jury having found that the plaintiff knew defendant to be a prostitute, and that he supplied the brougham with a knowledge that it was to be used by her as a part of her display to attract men, it was held that the plaintiff could not recover. "Since the case of *Cannan v. Bryce* (m), cited and followed by Lord Abinger, in *M'Kinnell v. Robinson* (n), I have considered it as settled law that any person who contributes to the performance of an illegal act by supplying a thing with the knowledge that it is going to be used for that purpose, cannot recover the price of the thing so supplied. If to create that incapacity it was ever considered necessary that the price should be bargained or expected to be paid out of the fruits of the illegal act, that proposition has been overruled, and has now ceased to be law. Nor can any distinction be made between an illegal and an immoral purpose (o)."

Past or future cohabitation is insufficient to support a promise (p). But an agreement by the reputed father of an illegitimate child to pay the mother an annuity if she will undertake the sole maintenance of the child, and not affiliate it on the father, is valid (q).

II. Of the General Indebitatus Assumpsit.

The rules laid down in the preceding pages govern the action of assumpsit in both its forms; that is, whether the plaintiff sets forth the agreement, for the breach of which he complains, specially; or whether, the nature of his case permitting it, he

(l) *Lloyd v. Johnson*, 1 B. & P. 340.

(m) 3 B. & Ald. 179.

(n) 3 M. & W. 434.

(o) *Pearce v. Brookes*, 1 L. R. Exch. 213; 35 L. J. Exch. 134.

(p) *Binnington v. Wallis*, 4 B. & Ald. 650.

(q) *Crowhurst v. Laverack*, 8 Exch. 208.

adopts the more general form of what are called the *indebitatus* counts.

The distinction between the actions of assumpsit and debt so far as the *indebitatus* counts are concerned,—for debt lies in many cases where assumpsit does not,—was, previously to the 15 & 16 Vict. c. 76, one of form only, for it was held, that the former would not lie in any case but where the latter did (*r*). The declaration in both cases recited, that the defendant was indebted to the plaintiff for goods bargained and sold, or sold and delivered, &c. (as the case might be), and in assumpsit proceeded to allege that the defendant, “in consideration of the premises, *promised* to pay,” a promise which the law implied from the sale or delivery, &c. of the goods, and which it was not necessary to prove; whereas in debt it proceeded to state, that by the non-payment of the sum claimed, an action had accrued to the plaintiff to demand it from the defendant, omitting the statement of the promise. The above act, however (s. 49), directs that “the statement (in pleadings) of promises, which need not be proved as promises in *Indebitatus* counts, &c. *shall* be omitted,” and in schedule (B.), forms 1 to 14, gives some specimens of such counts in a form somewhat different from that previously used, the appropriate plea to which, by the provisions of the same schedule, is “never *indebted*.”—By s. 91, it is enacted, that the forms in the schedule (B.) *may* be used, and they certainly should be (*s*), so that all actions on the *indebitatus* counts are now both in form and substance actions *of debt*.

Of the Indebitatus Counts.—Forms of such counts will be found in the schedule (B.) to the 15 & 16 Vict. c. 76, forms 1 to 14, and it is enacted by s. 91, that “the forms contained in the schedule shall be sufficient, and those and the like forms may be used with such modifications as may be necessary to meet the facts of the case, but nothing herein contained shall render it erroneous or irregular to depart from the letter of such forms, so long as the substance is expressed without prolixity.” Those of the *indebitatus* counts in most frequent use, viz., for work done and materials provided, goods bargained and sold, goods sold and delivered, money lent, money paid, money received, and, on an account stated, are called the common counts. Although the form of the *indebitatus* counts, as will be seen from the examples above given, is very concise, it is necessary that it should appear *for what* the defendant is indebted. A declaration merely stating that the defendant was indebted, &c., not stating for what, is bad in arrest of judgment (*t*), or judgment upon it would be reversed in error (*u*). It should appear, too, that the action is brought for

(*r*) *Hard's case*, Salk. 23.

(*s*) See *Place v. Potts*, 8 Exch. 705.

(*t*) *Poster v. Smith*, Cro. Car. 31. See

now 15 & 16 Vict. 76, s. 143.

(*u*) *Woodford v. Deacon*, Cro. Jac. 206.

a debt payable *in presenti*; a declaration stating that the defendants were indebted to the plaintiffs for freight, omitting the words "for money payable," was held bad on general demurrer (*x*). It is sufficient, however, if the cause of action be stated quite generally, *e. g.*, for the agistment of cattle on the plaintiff's ground (*y*); for a premium upon a policy of insurance upon such a ship (*z*); on a foreign judgment, without stating the cause of action on which the judgment proceeded (*a*). And it is not necessary to specify the particular items constituting the debt or demand (*b*). Their generality is limited by the particulars of demand which the plaintiff by Rule 19 of Reg. Gen. (Hil. T. 1853) is to deliver with the declaration in every case, (except where the writ has been specially indorsed under the provisions of the 25th section of the Common Law Procedure Act, 1852,) a copy of which particulars must be annexed by plaintiff's attorney to the record at the time when it is entered with the proper officer. This annexation supersedes the necessity of proof of delivery at the trial (*c*), and if the plaintiff gives credit in the particulars for any sum of money paid to him, it is not necessary for the defendant to plead payment of such sum (*d*); see *post*, tit. "Debt."

In consequence of their conciseness, and the latitude of proof which they admit of at the trial, the *indebitatus* counts are generally used where applicable. They will not lie on a special agreement till the terms of it have been performed (*e*), but "whenever the terms of a special agreement have been performed, so as to leave a mere simple debt or duty between the parties" [where the duty consists in a money payment], "the plaintiff may give the circumstances in evidence, and recover under the *indebitatus* counts" (*f*).

A corporation aggregate may sue and be sued in the *indebitatus* counts on an executed parol contract (*g*), *e. g.*, for goods sold and delivered; for they may contract without affixing the common seal, in cases where convenience, amounting almost to necessity, requires that they should do so; as in hiring inferior servants, or doing acts frequently recurring, or too insignificant to be worth the trouble of affixing the common seal (*h*), or in matters connected with, and necessary for, the business or trade for which they are

(*x*) *Place v. Potts*, 8 Exch. 25.

(*y*) *Gardiner v. Bellingham*, Hob. 5.

(*z*) *Fowl v. Pinsacke*, 2 Lev. 153.

(*a*) *Plaistow v. Van Uzem*, Doug. 5, n.

An Irish judgment since the Union, *Harris v. Saunders*, 4 B. & C. 411. See *Guinness v. Carroll*, 1 B. & Ad. 459.

(*b*) *Holmes v. Savill*, Cro. Car. 116; *Hibbert v. Courthorpe*, Carth. 276.

(*c*) *Macarthy v. Smith*, 8 Bingh. 145.

(*d*) 13 Pl. R., Hil. T. 1853; *Morris v. Jones*, 1 Q. B. 397. *Post*, "Pleadings," "Payment."

(*e*) *Gordon v. Martin*, Fitzgibbon, 303; *Scott v. Parker*, 1 Q. B. 809.

(*f*) *Per Parke, B.*, in *Stone v. Rogers*, 2 M. & W. 448; and see *Linnegar v. Hodd*, 5 C. B. 437.

(*g*) *Beverley v. The Lincoln Gas and Coke Company*, 6 A. & E. 829; and see *Finlay v. Bristol and Exeter Railway Company*, 7 Exch. 409; *Haigh v. North Brierly Union*, 28 L. J. 62, Q. B.

(*h*) *Mayor of Ludlow v. Charlton*, 6 M. & W. 822.

incorporated (*i*). The appointment of an attorney to conduct important suits affecting the rights and property of the corporation cannot be considered a trifling matter; nor is it of such frequent occurrence, or of such immediate urgency, as to render it inconvenient to postpone it until the seal of the corporation can be affixed to the retainer (*k*). It makes no difference as to the right of a corporation to sue on a contract entered into by them without seal, whether the contract be executed or executory, or whether the promises be express or implied (*l*); although it may, if they be the parties sued (*m*). In a case (*n*), where the contract was one which did not fall within any of the exceptions to the general rule requiring corporate contracts to be under the common seal, but which had been executed by the corporation, *Tindal*, C.J., delivering the judgment of the court, said, "whatever may be the consequences, where the agreement is entirely executory on the part of the corporation, yet, if the contract, instead of being executory, is executed on their part,—if the persons who are parties to the contract with the corporation *have received* the benefit of the consideration moving from the corporation,—in that case the other parties are bound by the contract, and liable to be sued thereon by the corporation. Even if the contract put in suit by the corporation had been, on their part, executory only, not executed, we feel little doubt but that their suing upon the contract would amount to an admission on record by them that such contract was duly entered into on their part so as to bind themselves; and that such admission on the record would estop them from setting up as an objection, in a cross action, that it was not sealed with their common seal" (*o*).

In addition to the causes of action already enumerated, it has been held, that the *indebitatus* counts will lie for a fee due from any person who accepts the honour of knighthood, to the gentlemen ushers and daily waiters to the king (*p*); for fees due to an usher of the black rod (*q*); for a reasonable and customary fine due to the heir of the lord from the copyholder, upon the death of the lord (*r*); for a fine upon an admittance to a copyhold (*s*); or customary tenement (*t*); for freight (*u*); for goods and chattels, *e.g.*, fish due by custom in respect of the plaintiff's liability to keep up a capstan and rope for the purpose of hauling the boats

(*i*) *Henderson v. Australian Steam Navigation Company*, 24 L. J., Q. B. 322; *Smith v. Hull Glass Company*, 11 C. B. 897; *Australian Steam Navigation Company v. Marzetti*, 11 Exch. 228; *Prince of Wales Insurance Company v. Harding*, 27 L. J. 297, Q. B.

(*k*) *Arnold v. Mayor of Poole*, 4 M. & G. 896; 5 Scott's N. R. 777.

(*l*) *Church v. The Imperial Gas Light and Coke Company*, 6 A. & E. 846.

(*m*) *Doe v. Taniere*, 12 Q. B. 1013.

(*n*) *The Fishmongers' Company v. Robertson*, 5 M. & G. 131, 6 Scott's N. R. 56.

(*o*) *Acc. Mayor of Sandwich v. The Queen*, 16 L. J., Q. B. 432.

(*p*) *Duppa v. Gerrard*, Carth. 95.

(*q*) *Saunders v. Brignall*, Str. 747.

(*r*) *Shuttleworth v. Garrett*, Carth. 90, *Holt*, C.J., diss.

(*s*) *Shuttleworth v. Garrett*, *supra*.

(*t*) *Whitfield v. Hunt*, Dougl. 727, b.

(*u*) 1 Vent. 100.

on shore (*v*); for money due by the custom of London for scavage (*x*); for tolls (*y*); for tolls of wheat (*z*); for stallage, by the owner of a market, and that without showing any contract in fact between him and the occupier of the stall (*a*); for *petit* customs due to a municipal corporation (*b*); *e. g.*, weighage (*c*); for burial fees (*d*), if actually paid to a receiver, and the question is one of money had and received as between the rector and receiver, otherwise an action does not lie, the remedy being in the spiritual court (*e*);—for a penalty due by the ordinances of a company for not serving the office of steward, according to a bye-law (*f*); lastly, on a foreign or colonial judgment (*g*), even for costs only (*h*).

In an action brought in England to recover the value of a given sum, Jamaica currency, upon a judgment obtained in that island; the value is that sum in sterling money which would have produced the sum recovered in Jamaica currency according to the rate of exchange between Jamaica and England at the date of the judgment (*i*).

A foreign or colonial judgment is not only *prima facie* evidence under these counts, but even *conclusive* upon the merits (*k*), (*à fortiori*, therefore, it would seem, upon the regularity of its own proceedings (*l*),) except where upon the face of the proceedings it is grounded upon a clear misconception of English (*m*) or inter-

(*v*) *Earl of Falmouth v. Penrose*, 6 B. & C. 385.

(*x*) *City of London v. Gorry*, 2 Lev. 174; 1 Vent. 298.

(*y*) *Seward v. Baker*, 1 T. R. 618; as for passing along a way. Such toll is either toll thorough or toll traverse; which last is the payment of a sum of money for passing over the soil of another in a way not an highway; 2 Roll. Abr. 522; *Rickards v. Bennett*, 1 B. & C. 223. Toll thorough is a payment for passing along a highway, to support which some consideration must be proved, as repairing a road or bridge. The repair of some streets in a town is not a sufficient consideration to support the claim of toll thorough in all parts of the town. *Brett v. Beales*, 10 B. & C. 508. But if the taking of the toll, whether thorough or traverse, as well as the right of passage, be immemorial, it may be presumed that the soil was originally granted to the public in consideration of the toll; and such original grant is a good consideration for the toll, although the soil and toll should have been severed and got into different hands. *Lord Pelham v. Pickersgill*, 1 T. R. 660; *Hill v. Smith*, 4 Taunt. 520. A grant of a fair or mar-

ket, with an express grant of toll, passes reasonable toll, though no amount of toll be specified. *The Corporation of Stamford v. Pawlett*, 1 C. & J. 57.

(*z*) *Mayor of Reading v. Clark*, 4 B. & Ald. 268.

(*a*) *Mayor of Newport v. Saunders*, 3 B. & Ad. 411.

(*b*) *Mayor of Exeter v. Trimlet*, 2 Wils. 95.

(*c*) *Com. of London v. Hunt*, 3 Lev. 37.

(*d*) *Spry v. Emperor*, 6 M. & W. 639.

(*e*) *Spry v. Gallop*, 16 M. & W. 716.

(*f*) *Barber Surgeons v. Pelson*, 2 Lev. 252.

(*g*) *Walker v. Witter*, Dougl. 1, and *in notis*.

(*h*) *Russell v. Smyth*, 9 M. & W. 810.

(*i*) *Scott v. Bevan*, 2 B. & Ad. 78. See Story's Conflict of Laws, s. 308, *et seq.*

(*k*) *Bank of Australia v. Nias*, 16 Q. B.

717. See *Callendan v. Ditttrichs*, 4 M. & G. 68.

(*l*) See *Molony v. Gibbons*, 2 Camp. 502, except where the irregularity is contrary to the universal principles of justice, as in *Reynolds v. Fenton*, *infra*.

(*m*) *Novelli v. Rossi*, 2 B. & Ad. 757. Whether this fact could be shown by extrinsic evidence, *quære*.

national law (*n*). It may, however, be questioned on the ground that the foreign court had not jurisdiction of the subject matter of the suit (*o*), *e. g.*, that the defendant was never within the jurisdiction of the court (*p*); or on the ground of fraud, for fraud vitiates the most solemn proceedings even of our own courts (*q*); or on the ground that it is repugnant to natural principles of justice, *e. g.*, that defendant had no opportunity given him of making a defence (*r*). And such facts may be shown by extrinsic evidence (*s*).

They will also lie on a decree of the Court of Chancery, or a colonial court of equity, where the suit terminates in the simple result of ascertaining a clear balance and an unconditional decree that an individual must pay it (*t*). See *post*, tit. "Debt."

The *indebitatus* counts will not lie upon a bill of exchange by the payee against the acceptor (*u*), because the acceptance is only a collateral engagement to pay the debt of another, namely, the drawer; nor would they lie for a wager (*x*); nor for goods bargained, unless there has been a sale (*y*); *e. g.*, for goods made to order, before a delivery of them by the maker, or an appropriation of them by the person for whom they were made (*z*); for the property must be changed to make the action maintainable. Thus, where the plaintiffs agreed to sell to the defendants a quantity of butter which they expected from Sligo, the quantity, quality, and price being specified in the contract, and the butter to be paid for by bill at two months from the date of landing; and the defendants accepted the invoice and bill of lading, but the butter was lost by shipwreck on the passage from Sligo, it was held, that the plaintiffs might recover the price of the butter from the defendants in an action for goods bargained and sold; and *per Tindal, C.J.*: "I agree that the plaintiffs must show that the property in the goods passed to the defendants by the contract, for unless it did, the goods were not bargained and sold to them; but if the goods were ascertained and accepted before the action was brought, it is no objection that they were not in the possession of the plaintiffs at the time of the contract. In *Rhode v. Thwaites*, the vendor having in his warehouse a quantity of sugar in bulk, agreed to sell twenty hogsheads; four hogsheads were delivered; the vendor filled up and appropriated to the vendee sixteen other hogsheads; informed him that they were ready, and desired him to take them away; the vendee said he would take them as soon as he could;

(*n*) *Pollard v. Bell*, 8 T. R. 444.

(*o*) *Ferguson v. Mahon*, 11 A. & E.

179.

(*p*) *Buchanan v. Rucker*, 9 East. 191, but this fact would not conclusively show a want of jurisdiction. *Douglas v. Forrest*, 4 Bingh. 686.

(*q*) *Bowles v. Orr*, 1 Y. & C. 464; *per Cur.* 16 Q. B. 735.

(*r*) *Reynolds v. Fenton*, 3 C. B. 187.

(*s*) *Havelock v. Rockwood*, 8 T. R. 268.

(*t*) *Henderson v. Henderson*, 6 Q. B. 288.

(*u*) *Hard's case*, Salk. 23.

(*x*) *Bovey v. Castleman*, Lord Raym. 69.

(*y*) *Atkinson v. Bell*, 8 B. & C. 277.

(*z*) *Beaumont v. Brengeri*, 5 C. B. 301.

and it was held, that the appropriation having been made by the vendor and assented to by the vendee, the sixteen hogsheads *thereby passed to the latter (a)*, and that their value might be recovered by the vendor under a count for goods bargained and sold. Here it is impossible to say that the goods were not ascertained and accepted before the action was brought, for the quantity, quality, and price were all specified in the invoice, and the bill of lading was regularly indorsed to and accepted by the defendants" (b).

If a plaintiff, having declared on a special agreement, and also on the *indebitatus* counts, fail in proving the special agreement, he may resort to the general count (c). Formerly it was held that if A. declare upon a special agreement, and likewise upon a *quantum meruit*, and at the trial prove a special agreement, but different from that which is laid in the declaration, he cannot recover on either count: not on the first, because of the variance; nor on the second, because there was a special agreement; but if he prove a special agreement and the work done, *but not pursuant to such agreement*, he shall recover upon the *quantum meruit*. But the contrary seems now well settled (d). "I apprehend the rule to be this: where a party declares on a special contract, seeking to recover thereon, but fails in his right so to do altogether, he may recover on a general count, if the case be such, that, supposing there had been no special contract, he might still have recovered for money paid or for work and labour done. As in a case of a plaintiff suing a defendant as having built a house for him according to agreement: there, if he fail to prove that he has built it according to agreement, he may still recover for his work and labour done" (e). "If a man agrees to build for another a house, to be paid for it, and afterwards builds the house, in this case he has two ways of declaring, either upon the original executory agreement, as to be performed *in futuro*, or upon the *indebitatus* counts on a *quantum meruit*, when the house is actually built, and the agreement executed" (f).

Where the defendant answers the plaintiff's claim for breach of the special contract, and the plaintiff resorts to a *quantum meruit* for service performed, the jury may inquire what that service is reasonably worth (g). Where a person agrees to do certain specified work for a certain specified sum, under a fraudulent representation by the other party, of the amount of work to be

(a) See *Aldridge v. Johnson*, 7 E. & B. 885, *acc.*

(b) *Alexander v. Gardiner*, 1 B. N. C. 676; and see *Watt v. Baker*, 2 Exch. 1; *Godts v. Rose*, 17 C. B. 229; *Tansley v. Turner*, 2 B. N. C. 151; *Brown v. Hare*, 27 L. J., Exch. 372.

(c) *Leeds v. Burrows*, 12 East, 4. See

Pl. R., Hil. T. 1853, R. 1 & 3.

(d) Bull. N. P. 139.

(e) *Cooke v. Munstone*, 1 N. R. 354.

(f) *Per Denison, J., Alcorn v. Westbrook*, 1 Wils. 117.

(g) *Baillie v. Kell*, 4 B. N. C. 638. See *Read v. Rann*, 10 B. & C. 438.

performed, he cannot recover on a *quantum meruit* for the real value of the work, but, on ascertaining the fraud, should repudiate the contract, and sue for the deceit (*h*).

Action cannot be brought before Expiration of Credit.—In an action for goods sold and delivered, it appeared that the goods in question had been valued at a certain sum, for which *payment* was to be made by the defendant *in three months by a bill of two months*. The action was commenced before the expiration of five months from the day on which the contract was made. The Court of Queen's Bench were of opinion that the action was prematurely brought before the expiration of the credit, and that the defendant ought to have been sued for the not giving at the end of three months a bill of two months, in which action the plaintiff would have been entitled to recover damages against the defendant for his not having given the bill, such as the loss of interest, &c. (*i*). So where the bill was in fact drawn but refused acceptance (*k*). So where goods are sold, to be paid for partly by cash, but not specifying any goods in particular as the object of the cash payment, and the residue by bills at certain intervals, this is an entire contract, and no action will lie for goods sold and delivered, even for the cash payment, till the expiration of the credit (*l*). But where goods were sold at three months' credit, and the vendor agreed to take the vendee's bills for three months more, *if* at the expiration of the first three months the vendee wished for further time, this is a *condition*, and if the vendee does not avail himself of it by giving the bills, the action may be commenced at the expiration of the first three months (*m*). So where goods were sold on an agreement for payment by bills at four months *or* cash, and the defendant paid part of the price in cash, it was held that he had exercised his option, and that the plaintiff might sue before the expiration of the four months (*n*).

Where the goods are fraudulently bought, the seller cannot sue for goods sold and delivered before the credit, if any, has expired, though he may in the interim disaffirm the contract, and maintain trover against the original purchaser (*o*). Where, however, goods are sold, and a bill or cheque is taken in payment payable at a future day, but *without any express agreement for time* for the payment of the goods; in this case, if the cheque is dishonoured, or the bill refused acceptance, the drawer may be sued immediately upon the original cause of action, without any regard being

(*h*) *Selaway v. Fogg*, 5 Q. B. 83.

(*i*) *Mussen v. Price*, 4 East, 147.

(*k*) *Dutton v. Solomonson*, 3 B. & P.

582.

(*l*) *Paul v. Dodd*, 2 C. B. 800; *Day v. Picton*, 10 B. & C. 120.

(*m*) *Nickson v. Jepson*, 2 Sta. 227.

(*n*) *Schneider v. Foster*, 2 H. & N. 4.

(*o*) *Strutt v. Smith*, 1 C. M. & R. 312.

Whether also against a person who has bought the goods from the original purchaser without notice of the fraud, *quære*. *White v. Garden*, 10 C. B. 919; *Merry v. Kingsford*, 1 H. & N. 512.

had to the time which the bill or cheque has to run; for there being no agreement as to time, the party takes them as payment, and, therefore, if they turn out to be good for nothing, the creditor has not received that which the other undertook to give him, and may therefore pursue his remedy immediately (*p*). A debtor is not discharged by giving a cheque which produces nothing, although payment in cash may have been previously tendered; and the circumstance of the cheque being given by the agent of a debtor, who is at the time indebted to his principal in a larger amount, makes no difference (*q*).

Goods were sold at six months' credit, payment to be then made by a bill at two or three months, at the purchaser's option; it was held (*Park, J., dubitante*), that this was in effect a credit for eight or nine months; that the statute of limitations would begin to run from the expiration of that time, and that before that time no action for goods sold and delivered could be maintained, although the plaintiff might have declared specially on the omission to give a bill at the end of six months (*r*). Where goods were sold "to be paid for in two months," it was held, that the day of the contract was excluded (*s*).

Whether Action lies when contract is entire.—A. agreed to deliver to B. 100 bags of hops, at a certain price per cwt. by a certain time. A. having delivered twelve bags before the stipulated time, and demanded payment, which was refused, immediately commenced an action for the price of the bags delivered. It was held, that as the contract was entire, the plaintiff was not entitled to bring an action, until the whole quantity was delivered, or until the time for delivering the whole had arrived (*t*). So where A. undertook, for a specific sum of money, to repair and make perfect a given article, then in a damaged state, and did repair it in part, but did not make it perfect, it was held that he could not recover for the value of the work done and materials found. In this case the contract was to do a specific work for a specific sum (*u*). So where A. agreed to assign to B. a lease of certain premises, and to sell him a greenhouse erected thereon (which A. had the power to remove at the end of the term) with some plants, &c., for 49*l.*, and B. was let into possession, but no assignment of the lease was made to him, it was held that the contract was entire, and that as the lease had not been assigned, A. could not recover for the price of the greenhouse, as to which there was no evidence of any new contract, although he did for the plants, as to which there was such evidence (*x*). So where a seaman agreed to serve for a certain

(*p*) *Stedman v. Gooch*, 1 Esp. 5; *Owenson v. Morse*, 7 T. R. 64; *Brown v. Kewley*, 2 B. & P. 518.

(*q*) *Everett v. Collins*, 2 Campb. 515.

(*r*) *Helps v. Winterbottom*, 2 B. & Ad. 431.

(*s*) *Webb v. Fairmaner*, 3 M. & W. 473.

(*t*) *Waddington v. Oliver*, 2 N. R. 61.

(*u*) *Sinclair v. Bowles*, 9 B. & C. 92.

(*x*) *Sleddon v. Cruickshank*, 16 M. & W. 71.

voyage, taking for wages a certain proportion of the net proceeds of the cargo; and, further, "that no one of the said officers and crew shall demand or be entitled to his share of the net proceeds of the said cargo *until the arrival of the said ship or vessel at London, &c.*" and the ship was disabled on the voyage and condemned in a foreign port, and never did reach London, but the cargo was transhipped into another vessel, and delivered in London, and the freight upon it paid, and the seaman died during the voyage in the second ship, it was held that his administrator was not entitled to anything under the agreement, but only for his service on board the second vessel on a *quantum meruit* (y).

But where a ship, being damaged at sea, put into a harbour to receive some repairs which had become necessary, and a shipwright was engaged and undertook to *put her into thorough repair*: before this was completed, he required payment for the work already done, without which he refused to proceed, and the vessel remained in an unfit state for sailing: it was held, that the shipwright might maintain an action for the work already done; for there was nothing in the present case amounting to a contract to do the whole repairs, and make no demand till they were completed (z). So where, though the contract be entire, as for the sale and delivery of goods at a particular time, some of the goods are delivered, although the purchaser is not bound to pay for that part before the expiration of the time fixed for the delivery of the whole; yet if, upon the seller's failure to complete the contract, the purchaser does not return the part delivered, but elects to keep that part, then the seller may bring an action for the value—not the stipulated price—of that part, although he (the seller) is liable to a cross-action or reduction of damages, or both (a), for the breach of his contract (b).

Where A. purchased goods of B., and paid a sum in deposit, and received part of the goods, but A. required B. to take them back, as not being equal to the sample, and to repay the deposit, B. resold the residue, and A. sued B. for the deposit; it was held, that A. could not recover the deposit as money had and received, unless there was fraud in the contract, or there had been an agreement between the parties to rescind the contract (c). *Note*.—The plaintiff in this case had examined the bulk. Where an entire contract

(y) *Jesse v. Roy*, 1 C. M. & R. 317; and see *Mitchell v. Darthez*, 2 B. N. C. 555; as to clerks' salaries, *Lamburn v. Cruden*, 2 M. & G. 253.

(z) *Roberts v. Havelock*, 3 B. & Ad. 404.

(a) *i. e.*, to a reduction of damages in respect of the decreased value of the article itself, and to a cross action for the *consequential* damages incurred by such

breach, which last-mentioned damages cannot be given in evidence in reduction of the value of the article in the first action. *Mondell v. Steel*, 8 M. & W. 858.

(b) *Shipton v. Casson*, 5 B. & C. 378; *Oxendale v. Wetherell*, 9 B. & C. 386. See also *James v. Cotton*, 7 Bingh. 266; *Richardson v. Dunn*, 2 Q. B. 218.

(c) *Fitt v. Cassanet*, 4 M. & G. 898.

exists to build a house, erect an engine, &c., the different articles necessary for the performance of the contract cannot be sued for by the contractor as goods sold and delivered (*d*).

A collateral undertaking must be declared on specially; as where B. undertook in writing to A., to answer for the payment of certain goods to be sent by him to C., it was held that A. could not maintain an action against B. for the price of the goods sent to C., but that he ought to have declared specially on the guaranty (*e*).

Of Money paid.—Where a person has laid out his own money for the use of another, either with the express or implied consent of such other person, the law implies a promise of repayment, for a breach of which an action for money paid may be maintained (*f*). As where one person is surety for another, and the surety is called upon to pay, it is money paid to the use of the principal debtor, and may be recovered against him in an action for money paid, even though the surety did not pay the debt by the desire of the principal (*g*). *Decker v. Pope*, London Sittings, 9th July, 1757, MS.—This was an action brought by an administrator *de bonis non* of a surety, who, at defendant's request, had joined with another friend of defendant's in giving a bond for the payment of the price of some goods that were sold to defendant: and the surety having been obliged to pay the money, the administrator declared against the defendant for so much money paid to his use: Lord Mansfield directed the jury to find for the plaintiff; observing, that where a debtor desires another person to be bound with him or for him, and the surety is afterwards obliged to pay the debt, this is a sufficient consideration to raise a promise in law, and to charge the principal in an action for money paid to his use. He added, that he had conferred with most of the judges upon it, and they agreed in that opinion.

A man who is *compelled*, *e.g.*, by a distress or threat of distress (*h*), to pay money, which another is bound by law to pay, is entitled to be reimbursed by the latter: and money paid under such circumstances may be considered as money paid to the use of the person who is so bound to pay it (*i*). Hence where the indorser of a bill, being sued by the holder, paid him part of the sum mentioned in the bill; it was held, that he might recover the same from the acceptor in an action for money paid to his use (*k*). So where several persons jointly contract for a chattel to be made or procured for the common benefit of all, the building of a ship

(*d*) *Clark v. Bulmer*, 11 M. & W. 243; and see *Tripp v. Armitage*, 4 *ib.* 687.

(*e*) *Mines v. Sculthorpe*, 2 Camp. 215.

(*f*) See *Jefferys v. Gurr*, 2 B. & Ad. 843.

(*g*) *Per Kenyon*, C.J., 8 T. R. 310.

(*h*) *Per Parke*, B., *Pope v. Biggs*, 9 B.

& C. 256; and see *Pitt v. Purssord*, 8 M. & W. 538; *per Lord Kenyon*, C.J., in *Child v. Morley*, 8 T. R. 610; *Griffin-hoofe v. Daubuz*, 25 L. J., Q. B. 237.

(*i*) *Exall v. Partridge*, 8 T. R. 308.

(*k*) *Pownall v. Ferrand*, 6 B. & C. 439.

for instance or the furnishing of a house, and as to which the executors of any party dying before the work is completed, are by agreement to stand in the place of the party dying; in such a case, though the legal remedy of the party employed would be solely against the survivors, yet the law would certainly imply a contract on the part of the deceased contractor that his executors should pay their proportion of the price of the article to be furnished (*l*). So where two persons are sureties for a third (whether by one or more instruments (*m*)), and the obligee compels one of the sureties to pay the whole debt, such surety may maintain an action against his co-surety, and thereby compel him to contribute his proportion (*n*) towards the payment of the debt; and it is not necessary that the insolvency of the principal debtor should be proved (*o*). But where it appeared that one of two sureties had been prevailed on to become a surety at the instance of the other, and the other had been compelled to pay the debt, Lord *Kenyon* would not permit him to call on his co-surety for contribution, more especially as he had taken a bill of sale from the principal debtor in order to protect himself (*p*).

A. being in want of goods went to B., accompanied by C., and ordered some, C. saying, in A.'s presence, that if A. did not pay he would; the goods having been supplied, and C. having paid the money, it was held, that he might recover it back from A.; inasmuch as the promise being made in the presence of A., there was an implied contract, that if C. paid the money, A. would repay it (*q*).

An action for money paid cannot be maintained unless there be a request to pay it, either express or implied. Hence, where the defendant contracted to transfer stock on a certain day to the plaintiff, but failed to perform his contract; upon which the plaintiff bought the stock, and to recover the consequent loss sustained by him, brought an action against the defendant for money paid: it was held, that such action was not maintainable, and that the plaintiff should have declared specially on the contract (*r*). So, where A. sold railway shares, of which B. without any privity with A. became the purchaser, and A. transferred them by deed to B.; B. omitted to register the deed of transfer, and A., thus remaining the registered owner, was compelled [by 8 & 9 Vict. c. 16, s. 15] to pay a call made upon them: it was held, that A. could not recover the amount paid from B., for there was no request, either express or implied, and B. was in no way liable for

(*l*) *Per Cur.*, *Prior v. Hembrow*, 8 M. & W. 873.

(*m*) *Deering v. Earl of Winchelsea*, 2 B. & P. 268.

(*n*) Which at law is determined by the number of sureties originally liable. *Batard v. Hawes*, 2 E. & B. 287.

(*o*) *Cowell v. Edwards*, 2 B & P. 268.

(*p*) *Turner v. Davis*, 2 Esp. 478.

(*q*) *Alexander v. Vane*, 1 M. & W. 511; and see *Simpson v. Penton*, 2 C. & M. 430.

(*r*) *Lightfoot v. Creed*, 8 Taunt. 268.

the call (s). But where a broker is employed by a principal to sell shares, &c., for him on the Stock Exchange, the principal impliedly gives him authority to act in accordance with the rules there established, and, therefore, if the principal does not perform his contract, and the party with whom the broker agreed for the sale of the shares, &c., buys other shares in the market, charging the broker with the difference, which the broker is compelled by the rules of the Stock Exchange to pay, he may recover the sum paid from his principal as money paid to his use (t).

A tenant, by a written agreement under which he took a house, agreed to pay taxes, which by statute were due from the landlord. The tenant, having made default, and the landlord having been obliged to pay, sued the tenant for the amount as money paid. It was held (u), that the form of action was misconceived, and that the tenant ought to have been sued on the agreement. The ground of the decision was, "that the plaintiff's payment relieved the defendant from no liability but what arose from the contract between them" (x). The real ground of that decision, however, was, that no request could be implied from the tenant upon the facts of that case, *per Cur.*, in *Brittain v. Lloyd* (y), which was the case of an auctioneer, who, having been obliged to pay the auction duty to the Crown, was held entitled to recover it back from his employer as money paid, and the rule was laid down, that "a person by requesting another to assume that character which ultimately obliges him to pay, impliedly requests him to pay, and is as much liable to repay as he would be on a direct request to pay money for him, with a promise to repay it." So, where a person has incurred and paid costs in bringing actions at the request of another, he may recover such costs from the person at whose instance he sued, in an action for money paid (z). But if an auctioneer is employed to sell an estate by auction, and he undertakes to conduct the auction so as to avoid incurring the duty if the estate is not sold, but through mistake transacts the business so that the duty attaches, which he is obliged to pay, the law will not raise an implied promise on the part of the employer to reimburse the auctioneer for the money paid for the duty, which has been thus incurred through his own blunder (a). So, an officer guilty of a breach of duty, as by letting a debtor out of prison on his promise to pay the creditor, cannot recover money which he has paid in consequence of it, though for the benefit of the defendant (b).

(s) *Sayles v. Blane*, 14 Q. B. 205.

(t) *Sutton v. Tatham*, 10 A. & E. 27; *Pollock v. Stables*, 12 Q. B. 765; *Taylor v. Stray*, 26 L. J., C. P. 185; but see *Westrop v. Solomon*, 8 C. B. 345; *Bowlby v. Bell*, 3 C. B. 284.

(u) *Spencer v. Parry*, 3 A. & E. 331.

(x) *Per Alderson, B.*, in *Kemp v. Pin-*

den, 12 M. & W. 423; *per Parke, B.* in *Hutchinson v. Sydney*, 10 Exch. 439.

(y) 14 M. & W. 762; and see *Wilson v. Carey*, 11 *ib.* 368.

(z) *Bailey v. Macauley*, 13 Q. B. 815.

(a) *Capp v. Topham*, 6 East, 392.

(b) *Pitcher v. Bailey*, 8 East, 171.

This action may be maintained by the bail against their principal, for the recovery of such sums of money as they, from their situation as bail, and in order to secure themselves, have expended. The bail may surrender their principal in their own discharge; if, therefore, the principal absconds, and the bail incur expenses in sending after him, and securing him, in order that he may be surrendered, such expenses may be recovered in this action against the principal (c). So, where A., B. and C. were lessees of certain premises, under covenant to pay the rent, and B. and C. assigned their interest to A., subsequent to which assignment, and with full knowledge whereof, the plaintiff put his goods on the premises, where they were taken as a distress for rent; and the plaintiff, in order to redeem his goods, was obliged to pay the rent due: it was held, that the plaintiff might maintain an action for money paid against A., B. and C., on the ground that they were all liable to the landlord for the rent in the first instance; and all three released therefrom by the payment of the rent by the plaintiff, which payment was not voluntary but compulsory (d). In this case, the money paid was *the plaintiff's* money: this is requisite for the maintenance of the action; for where A. let a house to B., which B. underlet to C., and A. distrained the goods of C. for rent due from B., which goods were afterwards sold, and the money arising from the sale paid over by the auctioneer to A.: it was held, that C. could not maintain an action against B. for money paid to his use, because, the money in question never was the money of C.; for the moment the goods were converted into money, that money vested in and became the property of the landlord; and C., the tenant, was only interested in the surplus, if any (e).

It is observable, that the mere circumstance of one person having received an advantage, from the payment of money by another, is not a sufficient ground for an action against the former; the consent of the party, either express or implied, is essentially necessary to the support of the action. In an action for money paid by the plaintiffs, to the use of the defendants, it appeared that, by 22 & 23 Car. II. c. 11, the parishes of St. Vedast's and St. Michael le Quern were united; and that since that time, one set of officers had served for the two parishes, the election of whom had always been made at a joint vestry; that all the vacancies in the office of sexton which had happened since, had been filled up agreeably to this custom; that in the year 1759, the sexton's salary was fixed at 20*l.* per annum, which was agreed to be paid equally by both parishes; that the overseers of St. Vedast's had paid the sexton who was last chosen the whole sum, to recover a moiety of which this action was brought. The defence was, that the last

(c) *Fisher v. Fellows*, 5 Esp. 171.

(d) *Exall v. Partridge*, 8 T. R. 308; see *ante*, p. 80, n. (i).

(e) *Moore v. Pyrke*, 11 East, 52; and see *Goepel v. Swinden*, 1 D. & L. 888; *Standish v. Ross*, 3 Exch. 527.

election of a sexton was not a joint one, and that the parish of St. Michael claimed a right of choosing a separate sexton for themselves, of which they had given notice to the other parish. Lord Mansfield, C. J.—“*This action must be grounded either on an express or implied consent; but here is neither*” (f). The consent, however, may be implied from custom: thus where the plaintiffs employed their own attorney to prepare a lease which they had agreed to grant to the defendant, and paid his charges, and it was proved to be the custom for the lessor’s attorney to prepare such an instrument at the expense of the lessee, it was held that the lessors were entitled to recover the sum they had paid for the preparation of the lease from the lessee (g).

If A. recover in an action founded on *tort* against B. and C. and levy the whole damages on B., B. cannot maintain an action against C. upon an implied agreement for the reimbursement of a moiety; for a contribution cannot be claimed as between joint wrong-doers (h). “From the inclination of the court, in *Phillips v. Biggs*, Hard. 164, and from the concluding part of Lord Kenyon’s judgment in *Merryweather v. Nixan*,” (in which he says that that decision would not affect cases of indemnity, where one man employed another to do acts, not unlawful in themselves, for the purpose of asserting a right,) “and from reason, justice, and sound policy, the rule that wrong-doers cannot have contribution against each other is confined to cases where the person seeking redress must be presumed to have known that he was doing an unlawful act.” *Per Cur.*, in *Adamson v. Jarvis*, 4 Bingh. 72; where it was held that an auctioneer employed by the defendant to sell goods, which were not the defendants’, and against whom the real owner of the goods had recovered in an action of trover, might sue the defendant on an implied contract of indemnity (i).

A different rule holds in the case of a joint judgment against several defendants in an action of assumpsit: *per* Lord Kenyon, C. J., in *Merryweather v. Nixan*. So an action lies by a ship-owner, to recover, from the owner of the cargo, his proportion of a general average loss, incurred by sacrificing the tackle belonging to a ship on an extraordinary emergency for the benefit of the whole concern (k). So an action may be maintained to recover a contribution, in the nature of a general average, by one shipper of goods against another (l). The owners of a ship’s cargo are liable to contribution, at the suit of the ship-owners, for ship’s stores thrown overboard to save the lives of the crew, (the cargo not being able to be got at,) after the vessel was captured, and while

(f) *Stokes v. Lewis*, 1 T. R. 20.

(g) *Grissell v. Robinson*, 3 B. N. C. 10.

(h) *Merryweather v. Nixan*, 8 T. R. 186.

(i) And see *Betts v. Gibbins*, 2 A. & E.

57.

(k) *Birkley v. Presgrave*, 1 East, 220.

See *Job v. Langton*, 6 E. & B. 779.

(l) *Dobson v. Wilson*, 3 Campb. 480.

she was in the hands of the enemy (*m*). The proprietor of goods laden on the deck of a ship, according to the custom of a particular trade, is entitled to contribution from the ship-owner for a loss by jettison (*n*); and the ship-owner may in such a case recover over from the insurer, without (*semble*) proving express notice that the goods would be so stowed (*o*).

One of several partners, who pays money on account of his partners, cannot maintain an action against them for contribution, on the ground that he made such payment, not voluntarily, but by compulsion of law (*p*).

A. having recovered a judgment against a trader, and taken out execution, a levy was made on the goods of the trader, but after he had committed an act of bankruptcy; the money levied was paid over to A. An action of trover was afterwards brought by the assignees against A., the sheriff, and the bailiff, in which damages were recovered: and these damages, together with the costs, were paid by the bailiff; it was held, that there was no implied promise on the part of A. to indemnify the bailiff, or to contribute to the damages and costs in the action of trover, they both being wrong-doers; but that the bailiff might, in an action for money had and received, recover the levy-money, being money paid under a mistake to A., and the bailiff being answerable for it to the assignees (*q*).

In a case where there were three assignees of a bankrupt's estate who had acted in the commission, and two of them paid the solicitor's bill, each paying half, it was held, that the two could not maintain a joint action against the third for contribution, but that each ought to bring a separate action (*r*). So where three entered into a joint and several bond of indemnity to a sheriff, for the protection of their separate interests, and the sheriff compelled two of them to pay the whole sum, it was held that they could not maintain a joint action against the third for contribution (*s*).

Of Money had and received.—The action for money had and received was called by Lord Mansfield “a kind of equitable action” (*t*); “where money is due *ex æquo et bono*, it may be recovered in this action” (*u*). From the following positions it may be collected in what cases this action may be maintained:—

1. If I pay money to a person who claims an authority to receive it, but really has not any such authority, and afterwards I

(*m*) *Price v. Noble*, 4 Taunt. 123.

(*n*) *Gould v. Oliver*, 4 B. N. C. 134.

(*o*) *Milward v. Hibbert*, 3 Q. B. 120.

(*p*) *Sadler v. Nixon*, 5 B. & Ad. 936;

see *Boulter v. Peplow*, 9 C. B. 493.

(*q*) *Wilson v. Milner*, 2 Campb. 452.

(*r*) *Brand v. Boulcott*, 3 B. & P. 235.

(*s*) *Kelby v. Vernon*, 5 Esp. 194; *Hart v. Briggs*, Holt, 245.

(*t*) *Moses v. Macfarlane*, 2 Burr. 1005-1012.

(*u*) *Per Tindal*, C. J., in *Smith v. Jones*, 6 Jur. 283.

am compelled to pay it again to the person lawfully entitled to receive it, an action for money had and received will lie against the person unjustly receiving the money (*x*). If A. be indebted to B., and pay such debt to the attorney of a person suing A. in B.'s name, but without B.'s authority, B. may, notwithstanding, recover the debt in an action against A., whose remedy is against the attorney, although the attorney was deceived by a forged power of attorney (*y*).

2. Where a person has usurped an office belonging to another, and taken the known and accustomed fees of office, an action for money had and received will lie at the suit of the party really entitled to the office, against the intruder, for the recovery of such fees (*z*). Hence this action is frequently brought to try the right to offices to which fees are annexed. The action, however, will not lie to recover gratuitous donations given to the intruder, *e. g.* money given by strangers for showing a church (*a*). The action does not lie by the nominee of a perpetual curacy for the profits thereof, until he has obtained the bishop's licence; for, in curacies, the party is not in possession until licence (*b*). But, in the case of a donative, the party is in full possession immediately on the nomination; and, consequently, if any other person takes the rents and profits, he may maintain the action immediately (*c*).

3. Where money, to which there was not any ground of claim in conscience, has been paid under a mistake of fact, the party may recover it back again in an action for money received (*d*). The fact must be a fact which, if true, would make the person *liable* to pay the money, not which, if true, would merely make it *desirable* that he should pay the money (*e*).

As where A., who was indebted to the estate of B., a bankrupt, paid the debt to B.'s assignees without setting off, as he was entitled to do, a sum of money due to himself from the bankrupt, it was held, that A. might recover the money, which he had neglected to set off, in an action for money had and received against the assignees (*f*). "Where a payment has been made, not with full knowledge of the facts, but only under a blind suspicion of the case, and it is found to have been paid unjustly, the party paying may recover it back again," *per Ashurst, J.* (*g*). So a

(*x*) *Bonnell v. Fouke*, 2 Sid. 4; *Cripps v. Reade*, 6 T. R. 606.

(*y*) *Robson v. Eaton*, 1 T. R. 62.

(*z*) *Arris v. Stukely*, 2 Mod. 260; *Howard v. Wood*, 2 Lev. 245; *Pollard v. Gerard*, 1 Ld. Raym. 703.

(*a*) *Boyter v. Dodsworth*, 6 T. R. 681. An information in the nature of a *quo warranto* is the only convenient method of trying the right, where there are no fees. *R. v. Bingham*, 2 East, 311.

(*b*) *Bowell v. Milbank*, 1 T. R. 399, n.;

2 Bl. R. 851, *S. C.*

(*c*) *Per Ashhurst, J.*, in *The King v. Bishop of Chester*, 1 T. R. 403.

(*d*) *Mills v. Alderbury Union*, 3 Exch. 590; *Milner v. Duncan*, 6 B. & C. 671.

(*e*) *Per Bramwell, B.*, *Aiken v. Short*, 1 H. & N. 215.

(*f*) *Bize v. Dickason*, 1 T. R. 285. See a note to 4 M. & G. 17.

(*g*) *Chatfield v. Paxton*, 2 East, 471, n.; See *Townsend v. Crowdey*, 8 C. B. (N. S.) 477.

payment made in the hours of business under a forgetfulness of facts which the party making it once knew, may be recovered back in this action (*h*); and it is not sufficient to prevent a party recovering money paid by him under a mistake of fact that he had the *means* of knowledge, unless he paid it intentionally not choosing to investigate the fact (*i*). Indeed, in all these cases there must be no laches imputable to the plaintiff, *e. g.* lying by for five years and not informing the person to whom the money has been paid of the mistake (*j*).

But where money has been paid under the compulsion of legal process in an action, which the party might have defended successfully if he had been prepared with his evidence, it cannot be recovered in this action; although such evidence be produced at the trial of the second action, as shows that the other party was not entitled to recover it in the first (*k*).

The defendant had brought an action against the present plaintiff for goods sold, for which the plaintiff had previously paid and obtained the defendant's receipt, but not being able to find the receipt at that time, and having no other proof of the payment, he was obliged to submit and pay the money again. The plaintiff afterwards found the receipt, and brought an action for money had and received in order to recover the amount he had so paid twice over. It was held that the action would not lie; Lord *Kenyon*, C. J., said, that after recovery *by process of law* there must be an end of litigation, otherwise there would not be any security for any person. And *Grose*, J., said, that it would tend to encourage the greatest negligence, if the court were to open a door to parties to try their causes again, because they were not properly prepared the first time with their evidence (*l*). So, "if the money has been paid after proceedings have actually commenced" (*e. g.* in the case of an action compromised (*m*)), "there being no fraud in the party suing, it cannot be recovered back" (*n*). Where it was agreed between A. and B., that A. for a certain commission should ship a cargo of wheat of a specific quality at a foreign port, for B. in England. The wheat, upon its arrival, having been found to be of an inferior quality, B. brought an action against A. for a breach of the agreement, and recovered damages. A. afterwards brought an action against B. for the commission; but it was held that A. could not recover; Lord *Ellenborough*, C.J., observing, that the facts which he relied on in this action might have been given in

(*h*) *Lucas v. Worswick*, 1 M. & Rob. 297.

(*i*) *Kelly v. Solari*, 9 M. & W. 54.

(*j*) *Skyving v. Greenwood*, 4 B. & C. 281. See *Denby v. Moore*, 1 B. & Ald. 123.

(*k*) *Hamlet v. Richardson*, 9 Bingh. 647.

(*l*) *Marriott v. Hampton*, 7 T. R. 269; and see *Reynolds v. Webb*, 4 B. N. C. 700; *Belcher v. Mills*, 2 C. M. & R. 150.

(*m*) *Hamlet v. Richardson*, 9 Bing. 647, overruling, on this point, *Cobden v. Kendrick*, 4 T. R. 432, n.

(*n*) *Per Holroyd, J.*, in *Milnes v. Duncan*, 6 B. & C. 679.

evidence to reduce the damages when he was defendant; and that he considered the account as closed between the parties by the former verdict (o).

The trustees, under a marriage settlement, of stock, the dividends of which they covenanted to permit the bankrupt to receive for his life, executed, after his bankruptcy, a power of attorney to A. to receive the same. A. received the dividends, and paid them over to the wife of the bankrupt, save one sum, which he paid to one of the trustees. Held, that the assignees might recover the total amount of such dividends from the trustees, in an action for money had and received, inasmuch as the whole of the money had been virtually received by the trustees after full notice of the bankruptcy (p).

A. having received a sum of money bequeathed by will to his wife, gave it to her to take care of. The wife, without his knowledge, deposited it in a bank, in the name of her son by a former marriage, who was then an infant. It was held, that the bankers were liable to A. for the amount in an action for money had and received (q).

Where a party pays money to another voluntarily, with full knowledge of all the facts of the case, the party so paying cannot recover it on account of his ignorance of the law. An underwriter of a policy of insurance upon a ship, having paid the amount of the insurance, as for a loss by capture, sought to recover it back, on the ground that the assured had not, at the time of effecting the insurance, disclosed to the underwriter a material letter respecting the time at which the ship sailed; but, it being proved, that, before the loss on the policy was adjusted, all the papers, including the letter in question, had been laid before the underwriter (r), it was held, that he could not recover; for every man must be taken to be cognizant of the law (s). The same doctrine was laid down in *Brisbane v. Dacres*, 5 Taunt. 143, with this limitation only, that the retaining the money be not against the conscience of the party to whom it is paid. And the rule holds equally where money has been allowed in account, as where it has been actually paid (t). The same principle was recognized in the following case. The drawer of a bill of exchange, with full knowledge of time having been given to the acceptor, upon a supposition that he (the drawer) remained liable, promised the holder that he would pay the bill, if the acceptor did not; it was held,

(o) *Kist v. Atkinson*, 2 Campb. 63; *Mondell v. Steel*, 8 M. & W. 871, *acc.*; *Goodman v. Pocock*, 15 Q. B. 576.

(p) *Allen v. Impett*, 8 Taunt. 263.

(q) *Calland v. Lloyd*, 6 M. & W. 26.

(r) This fact would be strong evidence to the jury of actual knowledge of the facts, or of an intention to waive all inquiry into them (*Kelly v. Solari*, 9 M. &

W. 59, *per Parke*, B.). The position of law, that possession of the means of knowledge is equivalent to actual knowledge, is overruled by *Bell v. Gardiner*, 4 M. & G. 11.

(s) *Bilbie v. Lumley*, 2 East, 469. See *Gomery v. Bond*, 3 M. & S. 378.

(t) *Skyring v. Greenwood*, 4 B. & C. 281.

that the drawer was bound by this promise, and could not avail himself of his ignorance of the law at the time when he made the promise (*u*). So where a person pays an attorney's bill, and the bill is subsequently taxed, and some items struck off, the amount of the sum taxed off cannot be recovered in this action (*x*).

What is a payment made *voluntarily* is sometimes a question. In cases of money paid under distress or threat of distress, it would seem clear that such a payment is to be considered as a compulsory payment (*y*), although it has been said that a payment under a wrongful distress is voluntary because the tenant might protect himself by replevin (*z*). Whether money had and received is an admissible form of action when goods have been seized under a wrongful distress seems very doubtful, replevin or trespass being, it is said, the proper and sufficient remedies (*a*). In *Knibbs v. Hall* (*b*), the defendant being tenant to the plaintiff of certain rooms at the rent of twenty guineas, the plaintiff insisted on being paid twenty-five guineas, and threatened to distrain if it was not paid. The defendant, in consequence of the threat, paid the larger sum, and an action having been brought by the plaintiff against the defendant for another demand, the defendant insisted on setting off the five guineas which he had paid under the threat of distress, as having been paid by compulsion, and in his own wrong. But Lord *Kenyon*, C.J., was of opinion, that this could not be deemed a payment by compulsion, as the defendant might, by a replevin, have defended himself against the distress. The reason, however, given by Lord *Kenyon* is not correct, a distress not being void, and replevin consequently not a sufficient remedy, if *some* rent be due (*c*). In *Graham v. Tate* (*d*), where a landlord had distrained and sold for rent, without allowing the property tax, or a sum of £20, which the tenant had laid out in repairs, and which the landlord had agreed to allow as a deduction from the rent, it was held that the tenant could not recover, as money received, the sum for repairs, but might recover the amount of income tax as money received by his landlord. The case of *Knibbs v. Hall*, however, was recognized in *Skeate v. Beale* (*e*), in which it was held that an agreement by the tenant to pay more than is due, in consideration of a forbearance or withdrawal of a distress, is valid, on the ground that an agreement cannot be avoided by duress of goods, although it may be by

(*u*) *Stevens v. Lynch*, 12 East, 38; and see *Bramston v. Robins*, 4 Bingh. 15.

(*x*) *Gower v. Popkin*, 2 Sta. 85.

(*y*) *Pope v. Biggs*, 9 B. & C. 256. *Acc. Carter v. Carter*, 5 Bingh. 406; *Snowdon v. Davis*, 1 Taunt. 359.

(*z*) *Knibbs v. Hall*, 1 Esp. 84.

(*a*) *Lindon v. Hooper*, Cowp. 414. Although this was a case of a distress or cattle damage feasant, it appears to apply

to every species of distress. For cases on excessive or wrongful distresses of cattle damage feasant, see position 10.

(*b*) 1 Esp. 84.

(*c*) *Forty v. Imber*, 6 East, 434; *Harrell v. Wink*, 8 Taunt. 369; *Governors of Bristol Poor v. Wait*, 1 A. & E. 269.

(*d*) 1 M. & S. 609.

(*e*) 11 A. & E. 983.

duress of person (i). It is clear that when a landlord distrains, not excessively, for rent in arrear, and demands a larger sum for arrears than the tenant admits to be due, the latter cannot pay the demand under protest without tendering the amount he alleges to be due and then bring an action for money had and received (k). A payment by a tenant of excessive broker's charges under threat of distress may be recovered back in this form of action as being money paid under duress, neither replevin nor trespass being applicable in such a case (l). A payment of rent by a tenant to his landlord, after notice from the mortgagee, requiring payment of the rent to him, is a voluntary payment (m).

Where a party, sued on a claim which he knows to be unfounded, pays it, although at the time of payment he protests against it, and declares his intention to bring an action to recover back the money so paid, yet no action will lie; for the payment is voluntary, and he ought to have defended the action brought against him (n). But where the steward of a manor charged an extravagant sum for producing some court rolls, &c., at a trial, which were absolutely necessary to the party requiring them, who paid the sum claimed accordingly, it was held, that he might recover the amount overpaid (o). So where money was paid to induce the defendants to perform a duty which they otherwise would not have performed, the non-performance of which would have caused great loss and inconvenience to the plaintiffs (p). So where a sheriff was in possession of goods under a *fi. fa.*, which he threatened to sell, and the parties claiming the goods paid the amount for which the writ of *fi. fa.* was indorsed, to avoid the evil and inconvenience of a sale (q).

Money due in point of honour or conscience, *e. g.*, a debt barred by the Statute of Limitations, though a person is not compellable to pay it, yet, if paid, shall not be recovered back (r).

4. Where money has been paid without consideration, or on a consideration which wholly fails, an action for money had and received will lie for recovery of it. The plaintiff had insured several numbers in a lottery, at the office of the defendant, for which he had paid in premiums a considerable sum of money. The defendant having refused to pay the sums insured upon some of the chances which had terminated in favour of the plaintiff, he

(i) But see the remarks of Lord Denman, C. J., upon this case in *Wakefield v. Newbon*, 6 Q. B. 280. See judgment of Parke, B., in *Atlee v. Backhouse*, 3 M. & W. 633.

(k) *Glynn v. Thomas*, 11 Ex. 879, in Error, recognizing *Gulliver v. Cozens*, 1 C. B. 788.

(l) *Hills v. Street*, 5 Bingh. 37.

(m) *Higgs v. Scott*, 7 C. B. 63.

(n) *Brown v. M'Kinnally*, 1 Esp. 279.

(o) ——— v. *Pigott*, cited by Lord Kenyon, C. J., 2 Esp. 723.

(p) *Parker v. Bristol and Exeter Railway*, 6 Exch. 702.

(q) *Valpy v. Manley*, 1 C. B. 594;

Close v. Phipps, 7 M. & G. 586.

(r) *Farmer v. Arundel*, 2 Bl. R. 824.

brought an action for money had and received against the defendant, in order to recover the premiums; it was held, that the action would well lie, although it was objected, that the contract was illegal by 14 Geo. III. c. 76, and the plaintiff *particeps criminis*; *Blackstone*, J., observing, that on the part of the insured, the contract on which he had paid his money was not criminal, but merely void, *and therefore having advanced his money without any consideration*, he was entitled to recover it back (s).

Plaintiff, a stockbroker, sold for defendant four Guatemala bonds and paid him the amount; the bonds, after they had been in the hands of the purchaser two days, were discovered to be not marketable; whereupon plaintiff took them back and reimbursed the purchaser. It was held, that the plaintiff was entitled to recover from the defendant, in an action for money had and received, the amount he had paid to the defendant (t). So where the plaintiff, a sharebroker, sold forged railway scrip for the defendant, and paid him over the proceeds, and the forgery was subsequently discovered (u). So where the plaintiff paid conduct money to a witness on a subpoena, but, the action being settled, the witness incurred no expense (x). So, where the deeds for securing an annuity were set aside for an informality in registering the memorial; it was held, that money paid to the grantor, as the consideration of the annuity, might be recovered in an action for money had and received (y). So where a deed, a bond, and a warrant of attorney (upon which judgment had been entered) had been given for securing an annuity, and on the application of the grantor to the Court of Queen's Bench, the judgment was set aside, and the warrant of attorney directed to be delivered up to be cancelled, because the latter instrument was improperly described in the memorial, but no order was made as to the deed or the bond, which remained uncanceled; it was held, that the grantee might recover the consideration in an action for money had and received, on the ground that he had contracted for one entire assurance, consisting of several securities, and that he had a right to have the assurance entire, or to have back his money; and the defendant having taken away one of the securities, the consideration for the money had failed (z).

In cases of this kind, the action for money had and received will not lie against a mere surety, who has not actually received

(s) *Jagues v. Golightly*, 2 Bl. R. 1073; and see the remarks of Lord *Ellenborough* in *Thistlerwood v. Cracroft*, 1 M. & S. 502. See *Jagues v. Withy*, 1 H. Bl. 65; *Clarke v. Shee*, Cowp. 197, and *post*, under the sixth rule.

(t) *Young v. Cole*, 3 B. N. C. 724.

(u) *Westrop v. Solomon*, 8 C. B. 345.

(x) *Martin v. Andrews*, 7 E. & B. 1.

(y) *Shove v. Webb*, 1 T. R. 732.

(z) *Scurfield v. Gowland*, 6 East, 241.

It does not appear that any sum had been received by the plaintiff on account of the annuity in this case. If it had, the balance of the consideration money only would seem to be recoverable. *Cowper v. Godmond*, 9 Bingh. 748; *Churchill v. Bertrand*, 3 Q. B. 568; and see *Davis v. Bryan*, 6 B. & C. 651.

any part of the consideration, although he has joined with the grantor in signing a receipt for it (b); for a receipt, even if indorsed on a bill (c) or deed (d), is only a *prima facie* acknowledgment that money has been paid, and may be explained or contradicted (e). It is an *admission* only (f), and the general rule is that an admission, though evidence against the person who made it, and those claiming under him, is not *conclusive* evidence, except as to the person who may have been induced by it to alter his condition.

A lease was sold to the plaintiff by defendant as administrator, without any regular assignment or other conveyance. The defendant's letters of administration were subsequently repealed, and the plaintiff turned out of possession by an ejectment at the suit of the new administrator: whereupon the plaintiff brought an action for money had and received against the defendant, to recover the consideration paid for the lease: and it was held, that it would well lie; Lord *Kenyon*, C. J., observing, "that he did not wish to disturb the rule of *caveat emptor*, adopted in *Bree v. Holbeach* (g), and in other cases, where a regular conveyance was made, to which other covenants (for title) were not to be added;" (imposing thereby on the buyer a duty to inquire into the title;) "but here the whole passed by parol, and it proceeded on a misapprehension by both parties, that the defendant was the legal administrator of the lessee, though it turned out afterwards that he was not. As, therefore, *the money was paid under a mistake*, he thought that an action for money had and received would lie to recover it back" (h). So, where the defendant, who was in possession of premises, of which he had been tenant under a lease from a tenant for life, then dead, sold to the plaintiff the lease, pretending that it was a good lease for seven years, and shortly afterwards the plaintiff was ejected, it was held, on the authority of *Cripps v. Reade*, that the plaintiff might recover the consideration paid for the lease in an action for money had and received (i). So where two parcels of land were sold at a distinct price for each, and the purchaser was evicted from one parcel for a defect in the title to it, it was held that he might recover the price, Lord *Alvanley*, C. J., saying, "We by no means wish to be understood to intimate, that where, under a contract of sale, a vendor does legally convey all the title which is in him, and that title turns out to be defective, the purchaser can sue the vendor in an action for money had and received. Every purchaser may protect his purchase by proper covenants; where the vendor's title is actually conveyed to the purchaser, the rule of

(b) *Straton v. Rastall*, 2 T. R. 366.

(c) *Scholey v. Walsby*, Peake's N. P. C. 24.

(d) *Lampon v. Corke*, 5 B. & Ald. 606.

(e) *Skarife v. Jackson*, 3 B. & C. 421.

(f) *Graves v. Key*, 3 B. & Ad. 318, n.;

Farrar v. Hutchinson, 9 A. & E. 641.

(g) Doug. 654.

(h) *Cripps v. Reade*, 6 T. R. 606.

(i) *Matthews v. Hollings*, MS., cited in Woodfall's Landlord and Tenant, 7th edit., 628, n.

caveat emptor applies. In the present case the plaintiff never has had any title conveyed to him, &c." (*k*).

Where money is paid, and the thing contracted for is not delivered, it is money had and received to the use of the party who has paid it (*l*). So, where A. paid B. a sum of money for a bill of exchange on a banker, who broke before it could be tendered; it was held, that A. might recover back the money in an action for money had and received. Bull. N. P. 131.

But where the consideration has not *wholly* failed, but the plaintiff has received (or might presumably have received (*m*)) some benefit from the performance of part of the consideration, so that the parties cannot be replaced *in statu quo* on the rescission of the contract, the action does not lie (*n*). As, where the plaintiff paid an annual sum for the use of a patent which turned out to be void, it was held, that the plaintiff could not recover the amount of the sums he had so paid (*o*). So, where the plaintiff was let into possession of premises under the provisions of a contract for sale, which also provided for the delivery by the defendant, within a certain time, of a full and sufficient abstract of title; it was held, that even if the required abstract had not been delivered, inasmuch as the plaintiff had had the possession of the property (for two years) and the parties could not be placed *in statu quo*, the action for money had and received could not be maintained (*p*). But where the plaintiff had entered into an agreement for the lease of a farm to him, for which he was to pay a premium of 500*l.* on possession being delivered, and he entered into possession immediately, and paid part of the premium, and occupied the farm for two years; but, on the non-execution of the lease by the defendant, brought an action to recover the sum he had paid as premium; it was held, that the action would lie: for although he had undoubtedly received benefit, and that under the agreement, yet the consideration for the payment of the premium was the granting of the lease, and that only, and, that having wholly failed, the plaintiff was entitled to recover (*q*).

5. If an undue advantage be taken of a person's situation, and money obtained from him by compulsion, such money may be recovered in an action for money had and received (*r*). As where a common carrier refuses to deliver up goods except upon payment of an unreasonable sum (*s*).

(*k*) *Johnson v. Johnson*, 3 B. & P. 162.

(*l*) *Anon.* per *King*, C.J., Str. 407.

(*m*) *Beed v. Blamford*, 2 Y. & J. 278.

(*n*) Although the plaintiff was originally induced to enter into the contract by the fraudulent representation of the defendant. *Clarke v. Dickson*, 27 L. J., Q. B. 223.

(*o*) *Taylor v. Hare*, 1 N. R. 260.

(*p*) *Blackburn v. Smith*, 2 Exch. 783.

(*q*) *Wright v. Colls*, 8 C. B. 150.

(*r*) This position was cited and adopted by *Coleridge, J.*, in *Duke de Cadaval v. Collins*, 4 A. & E. 867.

(*s*) *Ashmole v. Wainwright*, 2 Q. B. 837. See *Finnie v. Glasgow and S. W. Railway*, 2 M'Queen's H. of L. Ca. 177.

The plaintiff having in the month of August pawned some goods with the defendant for 20*l.*, without making any agreement for interest, went in the October following to redeem them, when the defendant insisted on having 10*l.* as interest for the 20*l.* ; the plaintiff tendered him the 20*l.*, and 4*l.* for interest, but, the defendant still insisting on having 10*l.* as interest, the plaintiff, finding that he could not otherwise get his goods back, paid the defendant the sum which he demanded, and brought an action for the surplus beyond the legal interest, as money had and received to his use. The court held, that the action would well lie, for it was a payment *by compulsion*, and the plaintiff might have had such an immediate want of his goods that an action of trover would not have answered his purpose, and the rule *volenti non fit injuria* holds only where the party has a freedom of exercising his will (*t*). No tender is necessary in these cases (*u*). The principle, that money extorted by duress of the plaintiff's goods, and paid by the plaintiff under protest, may be recovered in an action for money had and received, is well established and generally recognized (*x*). It has been held, that an agreement is not void on the ground of having been made under duress of goods ; and that there is not any distinction in this respect between a deed and an agreement not under seal (*y*).

The same principle was recognized in the following case. An action for money had and received was brought to recover a sum of money, as having been unduly obtained by the defendant from the plaintiff under an agreement to compromise a *qui tam* action for penalties which had been brought by the defendant against the plaintiff, on the ground of certain usurious transactions, which had taken place between the plaintiff Williams, and one Eagleton. It was held, that the action was maintainable ; for the prohibition and penalties of the 18 Eliz. c. 5, attach only on the "informer, or plaintiff or other person suing out process in the penal action making composition, &c." contrary to the statute, and not upon the party paying the composition, and, therefore, the latter did not stand in this respect *in pari delicto* nor was he *particeps criminis* with such informer or plaintiff, and, advantage having unduly been taken of his situation to coerce him, the money paid was recoverable (*z*). So, where A. had commenced an action of ejectment against B., and had subsequently received notice that B. intended to proceed against him for certain penalties under the General Turnpike Act, whereon it was arranged between them that the action of ejectment should be discontinued, and B. receive from A. 50*l.* towards the costs of his defence to the action of ejectment ; and

(*t*) *Astley v. Reynolds*, Str. 915.

(*u*) *Parker v. Bristol and Exeter Railway Company*, 6 Exch. 702.

(*x*) *Per Lord Denman, C.J., in Wakefield v. Newbon*, 13 L. J., Q. B. 260 ; 6

Q. B. 276.

(*y*) *Skeate v. Beale*, 11 A. & E. 983, ante, p. 101.

(*z*) *Williams v. Hedley*, 8 East, 378.

B. received the 50*l.* accordingly; it was held, that A. might recover the 50*l.* from B., if it was obtained from him by the coercion of the threatened penal action (a).

One who has voluntarily offered to pay a sum of money for the use of the poor of the parish, in order to avoid a prosecution by a magistrate upon a charge of having instigated the escape of a prisoner in custody for a misdemeanor, which offer has been consented to by the magistrate, and the money accordingly paid by the party to the master of the workhouse, for the use of the poor, may countermand the application of the money before it is so applied, and may recover it back in an action for money had and received (b).

Where the defendant, being a creditor of the plaintiff, entered into a composition deed with the other creditors to receive 10*s.* in the pound, under an agreement with the plaintiff, that he, the plaintiff, would give the defendant his promissory notes for the remainder of the debt, which notes were accordingly given, and the composition of 10*s.* was paid to the defendant, and he negotiated the notes, the holder of one of which enforced payment from the plaintiff by action; it was held, that the plaintiff might recover back the amount from the defendant in an action for money had and received; for this was not a case of *par delictum*, but of oppression on one side and submission on the other; and this might be considered as money paid to the order of the defendant, or, in other words, money had and received by him through the medium of the person to whom, by his order, it was paid (c). So, where the plaintiff being in embarrassed circumstances offered his creditors a composition of 5*s.* in the pound, and the defendant a creditor refused to accept it unless the plaintiff paid him 50*l.* and gave him a bill of exchange for 108*l.*, and as the other creditors would not accept the composition if the defendant did not, the plaintiff paid the defendant the 50*l.* and gave him the bill of exchange, it was held in the Exchequer Chamber that the plaintiff might recover the 50*l.* in an action for money had and received (d).

6. Where contracts or transactions are prohibited by positive enactments, for the sake of protecting one set of men from another, if money is paid upon such contracts by the one, who from their situation and condition are liable to be oppressed and imposed upon by the other, they are not considered as standing *in pari*

(a) *Unwin v. Leaper*, 1 M. & G. 747.

(b) *Taylor v. Lendey*, 9 East, 49.

(c) *Smith v. Cuff*, 6 M. & S. 160; *Horton v. Riley*, 11 M. & W. 492; *Alsager v. Spalding*, 4 B. N. C. 410; *s. v. per Parke, B.*, in *Higgins v. Pitt*, 4 Exch. 325; and if in such a case the defendant

does not negotiate the note or bill, and the plaintiff pays him, the payment is voluntary, and the plaintiff cannot recover the money so paid. *Wilson v. Ray*, 10 A. & E. 82.

(d) *Atkinson v. Danby*, 7 H. & N. 934, in Error; 31 L. J. 362, Exch.

delicto; and in furtherance of these statutes, the person injured, after the transaction is finished and completed, may bring his action and defeat the contract.

A creditor refused to sign the certificate of a bankrupt, unless a sum of money was given him by a friend of the bankrupt. The friend gave the money, and the creditor in consequence signed the certificate. It was held, that this money might be recovered in an action for money had and received; for the party, who insisted on payment, was acting with extortion, and oppressively, and in the teeth of that which he had agreed to accept, and against the letter and spirit of the stat. 5 Geo. 2, c. 30, s. 11 (*e*). So, formerly, in cases of usurious contracts (*f*); where it was held, that the debtor might recover from the creditor all beyond legal interest, in this form of action, because the parties did not stand *in pari delicto* (*g*). So in cases of lottery insurances (*h*).

Where a clerk of the plaintiff had received money, and negotiable notes, from the plaintiff's customers, and paid them over to the defendant as premiums for illegal insurances in a lottery, it was held that the plaintiff, upon identifying the property, might recover it in an action for money had and received; for the plaintiff was not *particeps criminis*, and the money had come to the defendant's hands iniquitously and illegally in breach of the statute (*i*).

7. Where money has been paid by one of two parties to an illegal contract to a third person, for the use of the other party, an action for money had and received will lie against such third person to recover it. As, where money was paid by an underwriter to a broker for the use of the assured on an illegal contract of insurance, it was held, that the assured might recover the money from the broker, on the ground that the broker could not insist on the illegality of the contract as a defence, the obligation on him arising out of the fact of the money having been received by him to the use of the plaintiff, which created a promise in law to pay. *Tenant v. Elliott*, 1 B. & P. 3. *Acc. Bousfield v. Wilson*, 16 M. & W. 185, and *Farmer v. Russell*, 1 B. & P. 296 (*k*), in which case *Buller, J.*, said that the action was not founded on the illegal contract, but on a ground totally distinct from it; *Heath, J.*, said, the distinction was, that, whether the consideration was good or bad, a man might recover *his own money*, though not

(*e*) *Smith v. Bromley*, Doug. 696, n. See an application of the principle of this case, by *Buller, J.*, in *Nerot v. Wallace*, 3 T. R. 25. See *per Bayley, J.*, in *Smith v. Cuff*, 6 M. & S. 165.

(*f*) By the 17 & 18 Vict. c. 90, all laws against usury are repealed.

(*g*) *Lowry v. Bourdieu*, Dougl. 471.

(*h*) *Jaques v. Golightly*, 2 Wm. Bl. 1073; *per Ellenborough, C. J.*, in *Thistle-*

wood v. Cracroft, 6 M. & S. 502.

(*i*) *Clarke v. Shee*, Cowp. 197. The cases of *Shove v. Webb*, T. R. 732, and *Scurfield v. Gowland*, 6 East, 241, on the Annuity Act, furnish a further illustration of the same principles. See *ante*, p. 102; see also *Jaques v. Withy*, 1 H. Bl. 65.

(*k*) But see *M'Gregor v. Lowe*, R. & M. 57.

that of another person. The test is whether the plaintiff requires any aid from the illegal transaction to establish his case (*l*). "It seems to me," said *Buller, J.*, in *Farmer v. Russell*, "that all the confusion in this case has arisen from the plaintiff having proved too much at the trial. He should have shown that the defendant received so much money to his use, and it was immaterial whether the money were paid on a legal or illegal contract" (*m*). The same principle was recognised in the following case. The defendant had employed the plaintiff to sell a ship to a foreign government, authorising him to employ a part of its proceeds in bribing its officials. The plaintiff sold the ship to the government for a certain sum, and informed the defendant that he had sold it for a certain sum net, and that the difference was to be applied in bribing the officials as agreed. This the defendant ratified, and the whole of the purchase money having been paid to the plaintiff as the defendant's agent, the plaintiff paid to the defendant the sum mentioned between them as 'net,' to the officials a part of the difference, and retained the rest for himself. Held that the defendant had a right to set off this latter sum in an action brought against him by the plaintiff; and as the defendant in claiming it did not set up or rely on the illegal arrangement, he would have a right to recover it as received to his use (*n*).

In *Faikney v. Reynous*, 4 Burr. 2369, it was held, that the plaintiff was entitled to recover upon a bond given by the defendants, to secure the repayment of a sum of money paid by the plaintiff to a third person on account of the defendants, on a settlement of stock-jobbing differences. The authority of this decision, however, was doubted in *Aubert v. Maze*, 2 B. & P. 371; and in *Cannan v. Bryce*, 3 B. & Ald. 179, it was held, that money lent for the purpose of settling losses on illegal stock-jobbing transactions, and so applied by the borrower, could not be recovered back, although the lender was no party to the stock-jobbing (*o*). "In the case of *M'Kinnell v. Robinson*, it was held, and I think properly held, that money lent to play at an illegal game could not be recovered. This was decided on the principle that money lent for the purpose of enabling the party to do an illegal act, and this with the knowledge of the lender, could not be made the foundation of an action." Per Lord *Lyndhurst*, C. (*p*).

Under the Stock-jobbing Act, 7 Geo. 2, c. 8, contracts for time bargains were declared void and penalties were imposed not only

(*l*) *Simpson v. Bloss*, 7 Taunt. 246, per *Gibbs*, C.J.

(*m*) Illegality of consideration, however, must be pleaded; 8 Pl. R. Hil. T. 1853; and, if pleaded, evidence of it would of course be given by the defendant.

(*n*) *Bone v. Ekless*, 29 L. J. 438, Exch.

(*o*) *Cannan v. Bryce*, was recognized in *M'Kinnell v. Robinson*, 3 M. & W. 441; and in *The Gas Light and Coke Company v. Turner*, 5 B. N. C. 677; 6 B. N. C. 324 (in error); and in *Pearce v. Brookes*, 1 L. R. Exch. 213.

(*p*) *Quarrier v. Colston*, 1 Phill. 151.

on parties entering into such contracts, but also on parties paying or receiving money to compound differences. Hence both making time bargains and settling were distinct substantive illegal acts, and therefore any one who knowingly lent money for the purpose of settling was a direct aider to the performance of an act illegal *per se*. The Stock-jobbing Acts were repealed by 23 & 24 Vict. c. 28, so that now wagering stock-jobbing transactions are on the same footing as ordinary wagers, which are regulated by 8 & 9 Vict. c. 109, which enacts (s. 18), "that all contracts or agreements whether by parol or in writing by way of gaming or wagering shall be null and void, and that no suit shall be brought or maintained in any court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made. Provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." The first branch of this section declares the contract to be null and void: the second prevents the *winner* from bringing an action to recover the amount of the bet from the loser: and the third prevents the *winner* from suing the stakeholder. *Per Maule, J., Varney v. Hickman*, 5 C. B. 271. Hence it is now no answer to an action for money paid at the request of the defendant to plead that the money was paid to settle losses on time bargains which plaintiff had made as broker for the defendant with third persons. "The law as to gaming contracts is that all such contracts are null and void, and no action can be maintained upon them, but they are not therefore illegal. The parties making them are not liable to any actions or any penalties. I am clearly of opinion that if a man loses a wager and gets another to pay the money for him, an action lies for the recovery of the money so paid," *per Erle, C.J. (q)*.

It has never, it is believed, been directly decided that money paid by request by a third party for the express purpose of settling an *illegal* contract cannot be recovered by action, but it would seem from the doctrine of *Cannan v. Bryce* that it cannot.

In the case of an action upon an agreement as to time bargains the question is, whether at the time of making the contract there was a *bond fide* intention to purchase or deliver shares. If there was such an intention the contract is good; if there was not, the contract is "an agreement by way of gaming or wagering" within the 18th section, and by that section is null and void (*r*).

In reference to the proviso it is to be observed, that the con-

(q) *Rosewarne v. Billing*, 15 C. B. (N. S.) 322. See also *Jessopp v. Lutwyche*, 10 Exch. 614; *Knight v. Cambers*, 15

C. B. 562; and *Hill v. Fox*, 4 H. & N. 359.

(r) *Barry v. Croskey*, 2 J. & H. 1.

tribution must be in money. Where two men each put 10*l.* into the hands of a stakeholder, the winner of a foot race between them to take the 20*l.*, the bargain was upheld as being within the proviso (s). But where two men being each possessed of a horse agreed to ride a race, and that the winner should have both horses, the agreement was held void, a horse not being a contribution within the meaning of the proviso (t).

Where a plaintiff who by defendant's authority had laid *illegal* bets in the defendant's name, and upon losing had paid them without an express direction to do so, it was held that he could not recover the amount from the defendant (u).

Where the money does not appear to have been actually paid into the hands of the defendant, but only an account stated between him and the other party to the illegal contract, in which the defendant has given credit to such party for the money, the court will not sustain the plaintiff's demand; for by so doing they would compel the execution of an illegal contract, as if it were a legal one (v), Lord *Ellenborough*, C. J., observing that "in cases of illegal transactions, the money may always be stopped while it is *in transitu* to the person who is entitled to receive it. If indeed this had been a legal transaction, the money might perhaps have been considered as paid; but we will not assist an illegal transaction in any respect."

8. Where money has been paid by one of two parties to an illegal contract, in a case where both parties may be considered as *participes criminis*, an action cannot be maintained, after the contract is executed, to recover the money; for *in pari delicto potior est conditio defendantis*. This rule is confined to the case of money paid by one of the parties to the other, as will appear from the 7th rule, and from the decision of *Cotton v. Thurland* (w). This was an action for money had and received, to recover a sum of money which had been deposited by the plaintiff, as his share of a stake, in the defendant's hands, upon the event of a boxing-match between the plaintiff and another person. The court were of opinion that the action would well lie, notwithstanding the match had been fought; Lord *Kenyon*, C. J., observing, "that the action was brought *not against one of the parties laying the wager*, but a stake-holder" (x); all the cases establish the same doctrine, that money received by a third person, *not a party* to the illegal contract, may be recovered before it is paid over, for to permit this is merely to allow a *locus pœnitentiæ*, and to prevent the illegal contract from being executed at all (y).

(s) *Batty v. Marriott*, 5 C. B. 818; 17 L. J. 215, C.P.

(t) *Coombs v. Dibble*, 35 L. J. 167, Exch.

(u) *Clayton v. Dilley*, 4 Taunt. 165.

(v) *Edgar v. Fowler*, 3 East, 222.

(w) 5 T. R. 405.

(x) *Acc. Smith v. Bickmore*, 4 Taunt. 474.

(y) *Tappenden v. Randall*, 2 B. & P.

Where there is a stakeholder, the contract is not executed till he has paid over the money, but where this has been done without any opposition from the losing party, no action will lie against him to recover it back (*z*); but where a wager has been laid on the event of an illegal game, *e. g.* a boxing-match, either party may recover his own stake (*a*) from the holder, even where the money has been paid over before action brought, if it has been paid over in opposition to the parties' express desire (*b*).

There is a sound distinction between contracts executed and executory; and if an action is brought to rescind a contract, you must do it while the contract remains executory. *Per Buller, J. (c).* *Heath, J., (d)* speaking of the preceding observation of *Buller, J.*, said, that it seemed to him that the distinction between contracts executory and executed, if taken with those modifications which *Mr. J. Buller* would necessarily have applied to it, was a sound distinction; that undoubtedly there might be cases where the contract might be of a nature too grossly immoral for the court to enter into any discussion of it, as where one man has paid money by way of hire to another to murder a third person; but where nothing of that kind occurred, he thought there ought to be a *locus pœnitentie*, and that a party should not be compelled against his will to adhere to the contract. *Rooke, J.*, said, that he wished it to be understood, that he fully acceded to the doctrine laid down by *Mr. J. Buller* respecting contracts executory and executed. "In *Tappenden v. Randall*, the court considered the distinction between contracts executed and executory as established; the judges all make that distinction; it is not called in aid; it is the ground of their judgment;" *per Sir J. Mansfield, C. J. (e).* Agreeably to this distinction was the following case (*f*). A sum of money had been paid in order to procure a place in the customs; the place had not been procured, and the party who had paid the money having brought an action to recover it back, it was held that he should recover; *because the contract remained executory (g).* I. S. being under sentence of death in Newgate, the plaintiff was prevailed upon to lodge a sum of money in the hands of the defendant, to be applied to the purpose of procuring him a pardon. The pardon not having been procured, an action was brought to recover the money; but Lord *Eldon, C. J.*, was

471. See 8 & 9 Vict. c. 109, s. 18, *ante*, p. 109.

(*z*) *Howson v. Hancock*, 8 T. R. 575.

(*a*) If he claims the whole, *semble*, he cannot recover even his own stake. *Mearing v. Hellings*, 14 M. & W. 712.

(*b*) *Hastelow v. Jackson*, 8 B. & C. 221; recognized by *Bayley, B.*, in *Hodson v. Terrill*, 1 C. & M. 804; *Howson v. Hancock*, 8 T. R. 575. See *Goldsmith v. Martin*, 4 M. & G. 5; *Brown v. Overbury*, 11 Exch. 716.

(*c*) *Lowry v. Bourdieu*, Doug. 468.

(*d*) *Tappenden v. Randall*, 2 B. & P. 471.

(*e*) *Aubert v. Walsh*, 3 Taunt. 281.

(*f*) *Walker v. Chapman*, stated by *Buller, J.*, in *Lowry v. Bourdieu*, Doug. 471.

(*g*) And see *Pickard v. Bonner*, Peake's N. P. C. 221; *Aubert v. Walsh*, 3 Taunt. 227. As to what shall be notice of rescinding the contract, see *Busk v. Walsh*, 4 Taunt. 290.

of opinion, that the action was not maintainable; that where a person interposed his interest and good offices to procure a pardon, it ought to be done gratuitously, and not for money; the doing an act of that description should proceed from pure, and not from pecuniary motives (*d*).

It must be admitted, that the case of *Lacaussade v. White* (*e*), militates against position 8. There, money paid on an illegal wager was recovered, after the event upon which the wager proceeded had terminated against the plaintiff, and the plaintiff had paid over the money to the defendant, the court holding it more consonant with sound policy to permit money paid on an illegal consideration to be recovered by the party paying it, than by denying the remedy to give effect to the illegal contract. But this case has long since been considered as overruled (*f*).

The plaintiff and defendant laid a wager on the event of a horse-race, prohibited by 13 Geo. II. c. 19 (*g*), and deposited the money in the hands of the defendant; the money was paid over to him, with the consent of the plaintiff, who afterwards brought an action to recover it; but it was held, that it would not lie; for although the law would not have enforced the payment of it, yet having been paid, it was not against conscience for the defendant to retain it (*h*). So if A. agree to give B. money for doing an illegal act, B. cannot (although he do the act) recover the money by an action: yet if the money be paid, A. cannot recover it (*i*).

The plaintiff and defendant, who were lottery-office keepers, entered into an agreement mutually to insure the number of a ticket with each other, upon condition that he whose number should be drawn on the day next following the agreement, should receive from the other an undrawn ticket, or the value of it; the defendant's number being drawn, he chose the value of it, and received the same from the plaintiff; the agreement having been continued, the plaintiff's number was drawn, but the defendant refused to give the plaintiff either an undrawn ticket or the value, whereupon the plaintiff brought an action for money had and received to recover the sum which he paid to the defendant on his number being drawn; it was held, that the action would not lie, because the plaintiff was not only *in pari delicto*, but also stood in the light of that species of insurer, from whom the statute meant to protect the unwary (*j*).

(*d*) *Norman v. Cole*, 3 Esp. 253.

(*e*) 7 T. R. 535.

(*f*) *Lawrence, J.*, in *Williams v. Hedley*, 8 East, 382 n., and *Bayley, J.*, in *Hastelow v. Jackson*, appear to have considered *Lacaussade v. White* as overruled. And Lord Mansfield, C. J., delivering the opinion of the court in *Aubert v. Walsh*, 3 Taunt. 284, speaks

to the same effect.

(*g*) So much of this act as relates to horse-racing is repealed by 3 & 4 Vict. c. 5.

(*h*) *Howson v. Hancock*, 8 T. R. 575.

(*i*) *Webb v. Bishop*, Bull. N. P. 16, 132.

(*j*) *Browning v. Morris*, Cowp. 792.

The plaintiff executed an indenture of apprenticeship, by which she bound her son apprentice to the defendant, and she paid the defendant a premium. The indenture did not contain any statement respecting the premium, and was not stamped; by reason of which omissions the indenture was void. The plaintiff sought to recover the premium, on the ground that the indenture being void, the money was paid without consideration. But it was held, that she could not recover, inasmuch as she had lent assistance to the defendant in giving effect to unlawful purposes for defrauding the revenue (*k*).

In like manner, where an assurance was made on a ship belonging to a British subject, without interest, (which is illegal by 19 Geo. II. c. 37,) it was held, that the assured could not recover the premium, after the ship had arrived safe: for the court will not interfere to assist either party, where they are *in pari delicto* (*l*). On the same principle it was adjudged, that a premium paid by the plaintiff on a re-assurance of the ship, (void by 19 Geo. II. c. 37,) could not be recovered in an action for money had and received after the ship had been captured (*m*). In like manner it has been held, that the premium paid on an illegal assurance to cover a trading with the enemy, cannot, after the risk has been run, be recovered back again, although the underwriters could not have been compelled to make good the loss (*n*). So where the plaintiff had insured colonial produce, on a voyage from the West Indies for Gibraltar, and the ship, on board which the goods were laden, was lost by the perils of the seas, it was held, that the premium could not be recovered; because colonial produce could not legally be shipped from the British West Indies for Gibraltar (*o*), and consequently the insurance was illegal (*p*). And, as every person must be taken to be cognizant of the law, the ignorance of the assured, at the time when the assurance was made, that the insurance was illegal, will not avail him. And this rule holds even in cases where the premium is paid by a foreigner, although the policy is illegal by the law of this country only, and not by the law of the country to which the foreigner belongs; because the rigour of our political regulations ought not to be relaxed in favour of foreigners offending against them, and there is very little reason to presume ignorance of laws peculiarly applicable to the subjects of a foreign state (*q*).

But where an insurance had been made on goods, at and from a port in Russia to London, by an agent residing here for a Russian subject abroad, which insurance was in fact made after the commencement of hostilities by Russia against this country, but before

(*k*) *Stokes v. Twitchen*, 8 Taunt. 492.

(*l*) *Lowry v. Bourdieu*, Dougl. 467.

(*m*) *Andree v. Fletcher*, 3 T. R. 266.

(*n*) *Vandyc v. Hewitt*, 1 East, 97.

(*o*) By 12 Car. II. c. 18, s. 1; re-

pealed by 6 Geo. IV. c. 105. The present Navigation Act is the 17 & 18 Vict. c. 120.

(*p*) *Lubbock v. Potts*, 7 East, 449.

(*q*) *Morck v. Abel*, 3 B. & P. 35.

the knowledge of it here, and after the ship had sailed, and been seized and confiscated, it was held, that although the policy was in fact illegal and void, yet the agent of the assured was entitled to a return of the premium paid under ignorance of the fact of such hostilities (*q*). So where a licence was obtained and insurance effected from Riga to Hull, on goods the produce of Russia, on board a Swedish ship, but the ship sailed three days before the letter directing the licence to be obtained reached the agent, the letter having been delayed by contrary winds beyond the usual time, and the licence was obtained two days afterwards, and the insurance effected subsequently to that: it was held, on the same principle as in the foregoing case, that though the voyage was in its inception illegal, being contrary to 12 Car. II. c. 18 (*r*), nevertheless the assured might recover back the premium (*s*).

9. Where the contract is not *malum in se*, nor prohibited by any positive law, but is of such a nature that it cannot be put in force, merely because it would be inconvenient that the merits of the question should be publicly discussed, in such case, while the contract remains executory, money paid upon it by one of the parties to the other *may* be recovered. A., in consideration of a sum of money paid to him by B., gave a bond conditioned for the payment of an annuity to B. until A. should make it appear to the satisfaction of B. that the hop duties should amount to such a sum in any one year. Before the day on which the first payment of the annuity was to have taken place, and before any payment had been made, B. applied to A., stating that he considered the bond to be illegal, and demanded a return of the consideration, which having been refused, B. brought an action against A. for money had and received: it was held, that it would well lie; *Rooke, J.*, observing, that "there was nothing criminal in this contract, nor had it been executed, nor was this a case where money, which has been paid over by a stake-holder, was sought to be recovered" (*t*). Wagers on the amount of the hop duties, it is to be observed, are neither illegal nor immoral, but the courts refuse to enforce them, on account of public inconvenience (*u*).

A party who had contributed to a proposed tontine scheme was, on the abandonment of the project, allowed to recover his contribution from the director; the scheme not being within the Bubble Act (*x*). So where A. had sold shares to B. in a projected joint stock company, wherein nothing was to be done until the sanction of the legislature was obtained; it was held, that, under those circumstances, the proposed company was not illegal within the above statute, and that, the undertaking having been abandoned before

(*q*) *Oom v. Bruce*, 12 East, 225.

(*r*) See note (*n*), *supra*.

(*s*) *Hentig v. Staniforth*, 5 M. & S. 122.

(*t*) *Tappenden v. Randall*, 2 B. & P. 467. See *M'Gregor v. Lowe*, R. & M. 57.

(*u*) See *Shirley v. Sankey*, 2 B. & Pul. 130.

(*x*) *Nockels v. Crosby*, 3 B. & C. 814. The 6 Geo. I. c. 18 (the Bubble Act) is repealed by 6 Geo. IV. c. 91.

any thing was done pursuant to the project, B. might recover from A. the money paid for the shares (y).

10. The proprietor of cattle wrongfully distrained damage feasant, who, although insisting on a right of common, has paid money for the purpose of having his cattle re-delivered to him, cannot recover that money in an action for money had and received: 1. because such a mode of proceeding would impose great difficulties on the defendant, by not apprising him of what he was to defend: 2. because the law has provided two specific remedies for trying questions of this kind, namely, actions of replevin and trespass (z). And so if the distress is not wrongful, but an excessive sum is demanded for damage, he cannot, without tendering amends, pay the sum demanded, and recover the overcharge in this form of action, because in such cases the *onus* of ascertaining the amount of damage lies properly on the distrainee. *Gulliver v. Cosens*, 1 C. B. 788, where it was said that if a sufficient tender be made before distress, the remedy is replevin or trespass; if after the distress, and before the impounding, detinue. It was held by Sir J. Mansfield, whose opinion was afterwards recognized by the court, that an action on the case would not lie for detaining cattle distrained damage feasant, after tender of amends, such tender not having been made until after the impounding; for the goods are then *in custodia legis* (a).

In the case of *Lindon v. Hooper*, the right of common was in dispute at the time when the action for money had and received was brought to recover the money paid for the release of the cattle; the defendant, who had distrained the plaintiff's cattle, agreed to return the money if the plaintiff should make out his right, and the action was brought to try the right. But where it appeared that the plaintiff had, from time to time, paid rent to the defendants for premises which he held of them; and it afterwards turned out that the defendants had no title, and the plaintiff was ejected and compelled to pay the mesne profits for the time during which he had held of the defendants; it was adjudged that an action for money had and received would lie to recover the rent which the plaintiff had so paid to the defendants; but in this case it did not appear that the defendants, either at the time when this action was brought, or at the trial, claimed to have any title to the land (b).

Where an action for money had and received was brought against an overseer of the poor, to recover money in his hands, which had been levied by a sale of the plaintiff's goods on a conviction which was afterwards quashed, the court held, that the

(y) *Kempson v. Saunders*, 4 Bingham 5;
see *Watkins v. Huntley*, 2 C. & P. 410.

(z) *Lindon v. Hooper*, Cowp. 414.

(a) *Anscomb v. Shore*, 1 Camp. 285;

Six Carpenters' case, 8 Rep. 147.

(b) *Newsome v. Graham*, 10 B. & C. 234.

action was maintainable for the clear money produced by the sale of the goods: for the plaintiff might waive the tort, and sue for the money really due (c). So if a revenue officer seize goods as forfeited, which are not liable to seizure, and take money of the owner to release them, the owner may recover back the money in an action for money had and received (d), brought against the officer, and that whether he has paid the money over to the receiver or not (e).

A sheriff's officer had wrongfully seized, under a *fi. fa.* against A., a horse belonging to B. The horse was sold by the sheriff, and the money paid over to the officer; B. brought an action against the officer for money had and received. It appeared that the horse had belonged to B.'s husband, but that, after his death, she had provided for its keep. No letters of administration were produced. It was held, that this was sufficient evidence against a wrong-doer to entitle her to recover in an action for money had and received (f).

11. In cases where the contract is legal, the plaintiff cannot recover on the *general* counts, while the contract remains open and not rescinded by the defendant; the only remedy is on the *special* agreement. As where the defendant sold a horse to the

(c) *Feltham v. Terry*, Bull. N. P. 131, cited in Cowp. 419; and see *Priestley v. Watson*, 2 C. & M. 691.

(d) *Irving v. Wilson*, 4 T. R. 485. A question arose in this case, whether the officer was entitled to a month's notice, before the action was brought, under 23 Geo. III. c. 70, s. 30, in order to give him an opportunity of tendering amends. The court decided that he was not; *Grose, J.*, observing, that the act was confined to actions of trespass or tort, and did not extend to an action of assumpsit, and that "if an officer seize goods as forfeited, he does it *colore officii*, but if he take money for delivering up the goods there is no pretence to say that that is done *colore officii*." *Acc. per Lord Ellenborough, C. J.*, in *Wallace v. Smith*, 5 East, 122, and *Umphelby v. M'Lean*, 1 B. & Ald. 42, where the action was brought to recover the amount of an excessive charge made by the defendants as collectors on a distress for arrears of taxes. In *Greenway v. Hurd*, 4 T. R. 553, however, where an excise officer levied duties under an act which was repealed at the time when the duties were levied, Lord *Kenyon, C. J.*, expressed an opinion, that the officer was entitled to notice, although the plaintiff sued in assumpsit. "It has been frequently observed by the courts, that the notice which is directed to be given to justices and other officers, before actions are brought against them, is of

no use to them when they have acted within the strict line of their duty, and was only required for the purpose of protecting them in those cases where they intended to act within it, but by mistake exceeded it." In *Theobald v. Crichmore*, 1 B. & Ald. 227, Lord *Ellenborough, C. J.*, said, "The object was clearly to protect persons acting illegally, but in supposed pursuance and with a *bond fide* intention of discharging their duty under the act of parliament." *Acc. Waterhouse v. Keen*, 4 B. & C. 200. And the law with regard to notices of action is now settled, that "all who *bond fide* and reasonably think they fill the character mentioned in the several statutes, and act in pursuance of them, are protected, *per Rolfe, B.*, *Horn v. Thornborough*, 3 Exch. 850, and this whether they are aware of the statute giving them protection or not. *Read v. Coker*, 13 C. B. 850. "Reasonably" means acting "with reason," as opposed to acting "by caprice," and the terms "*bond fide*" and "reasonably" are, in this respect, synonymous. *Booth v. Olive*, 10 C. B. 827. By 5 & 6 Vict. c. 97, s. 4, the time for giving notice of action in all cases is one calendar month, *post*, tit. "Imprisonment."

(e) *Atlee v. Backhouse*, 3 M. & W. 648; and see *Greenway v. Hurd*, 4 T. R. 553; *Oates v. Hudson*, 6 Exch. 346.

(f) *Oughton v. Seppings*, 1 B. & Ad. 241.

plaintiff with a warranty of soundness, and the horse proved unsound; the plaintiff tendered a return of the horse, but the defendant refused to take him back; an action for money had and received having been brought, it was held that it would not lie (*g*). So where the defendant, in consideration of seventy guineas, sold the plaintiff a pair of coach horses, which he undertook to take back if the plaintiff should disapprove of them and return them within a month; the plaintiff did return them within a month, but took another pair from the defendant, without making any new agreement; these the plaintiff also returned within a month, and received a third pair on the 23rd of December, without making any new agreement; the plaintiff disapproved of the third pair, because they were restive and would not draw, and offered to return them on the 5th of January following, but the defendant refused to take them back, and, thereupon, the plaintiff brought an action against the defendant for money had and received. It was held that it would not lie, for the original special contract having been continued through all the subsequent dealings, the defendant ought to have had notice by the declaration, that he was sued upon that contract (*h*). So where a seaman had contracted with the defendant to go a voyage from A. to B. and back again, with a stipulation that he should not be entitled to his wages until the end of the voyage; it was held, that he could not maintain the *indebitatus* counts to recover his wages *pro rata* as far as B., though he had been wrongfully dismissed at B. by the defendant (*i*).

Where, however, the contract is rescinded by the original terms of it, no act remaining to be done by the defendant, the plaintiff is entitled to recover back his money (*k*). As where the plaintiff had paid to the defendant ten guineas for a chaise, on condition to be returned in case the plaintiff's wife did not approve of it, paying 3s. 6d. *per diem* for the time; the plaintiff's wife not approving of the chaise, it was sent back at the expiration of three days, and left on defendant's premises without any consent on his part to receive it; the hire of 3s. 6d. *per diem* was tendered at the same time, which defendant refused, as well as to return the money. An action for money had and received being brought for the ten guineas, it was held, that it would well lie (*l*). So where A. agreed to sell an estate to B., upon a deposit of a sum of money, but was afterwards disabled from performing the agreement; it was held, that B. might recover the deposit, although the agreement for the sale was by deed (*m*). So where a contract

(*g*) *Power v. Wells*, Doug. 24, n.; Cowp. 818, S. C.

(*h*) *Weston v. Downes*, Doug. 23, recognized in *Street v. Blay*, 2 B. & Ad. 462.

(*i*) *Hulle v. Heightman*, 2 East, 145.

(*k*) *Bristowe v. Needham*, 9 M. & W. 729.

(*l*) *Towers v. Barrett*, 1 T. R. 133. See *Hurst v. Orbell*, 8 A. & E. 107.

(*m*) *Greville v. Da Costa*, Peake's Add. Ca. 113.

is not carried into execution by reason of some negligence or default of one party, the other party, not having done any thing which can be considered as an execution of the contract in part, may abandon the contract and recover the money which he has paid on such contract (*n*). But this rule holds only where the contract can be rescinded *in toto*, so as to place both parties in the same situation they were in before (*o*).

12. In an action for money had and received to the plaintiff's use, the plaintiff cannot recover the money, unless it be against conscience that the defendant should retain it (*p*). Hence, where a forged bill of exchange was drawn upon the plaintiff, which he accepted and paid to an innocent indorsee for value, and the plaintiff, on discovering the forgery, brought an action against the indorsee to recover back the money as money paid by mistake, it was held, that the action would not lie: for it was not unconscientious in the defendant to retain the money when he had once received it, upon a bill for which he had given a fair and valuable consideration, without the least privity or suspicion of any forgery; and the plaintiff ought to have satisfied himself, whether the bill was really drawn upon him by the person whose name was subscribed to it (*q*). This decision appears to have been grounded on the general principle, that an acceptor is bound to know the handwriting of the drawer, and that it is by his fault or negligence if he pays on a forged signature; or rather, on the ground that the acceptor is estopped from disputing the authority of the drawer, for, if this were not so, the negotiability of bills, especially foreign ones where the drawer is generally a stranger, would be seriously endangered (*r*).

But where the plaintiff had discounted for the defendant a navy bill, which turned out to be forged, he was held liable to refund the money; although both parties were, at the time, equally ignorant of the forgery (*s*). So in *Bruce v. Bruce*, 5 Taunt. 495, n., a similar decision was made on a victualling bill, which the victualling office on which it was drawn had paid before the forgery was discovered. So where a bill, purporting to be a foreign bill, but which turned out to have been drawn in this country, and therefore being unstamped to be worthless, was sold, it was held the purchaser might recover the sum paid from the seller (*t*). So where bills of exchange, purporting among others to have the indorsement of H. & Co. bankers of Manchester, were presented for payment in London, where the acceptance directed them to be paid;

(*n*) *Giles v. Edwards*, 7 T. R. 181.

(*o*) *Hunt v. Silk*, 5 East, 449; *Beed v. Blandford*, 2 Y. & J. 278. See *Cooke v. Munstone*, 1 N. R. 351, and *ante*.

(*p*) *Aikin v. Short*, 1 H. & N. 210.

(*q*) *Price v. Neale*, 3 Burr. 1354; 1 Wm. Bl. 390, *S. C.* See *Smith v. Mercer*, 6 Taunt. 76, and *post*, tit. "Bills of Ex-

change." See also *Barber v. Gingell*, 3 Esp. 60.

(*r*) *Sanderson v. Collman*, 4 M. & G. 209.

(*s*) *Jones v. Ryde*, 5 Taunt. 488.

(*t*) *Gompertz v. Bartlett*, 2 E. & B. 849.

payment being refused, the notary who presented them took them to the plaintiff, the London correspondent of H. & Co., who took up the bills for their honour, and struck out the indorsements subsequent to that of H. & Co., and the money was paid over to the defendants, the holders of the bills. The same morning it was discovered that the bills were not genuine, and that the names of the drawer, acceptor, and H. & Co. were forgeries; plaintiff immediately sent notice to the defendants, and demanded repayment. This notice was given in time for the post, so that notice of the dishonour could have been sent the same day to the indorsers. It was held, that the plaintiff, having paid the money through a mistake, was entitled to recover it back, the mistake having been discovered before the defendant had lost his remedy against the prior indorsers (*x*), and that the rights of the parties were not altered by the erasure of the indorsements, that having been done by mistake, and being capable of explanation by evidence (*y*).

13. The plaintiff, as assignee of a bankrupt, brought an action to recover the proceeds of goods of the bankrupt, sold by the defendants as sheriff, under a writ of *fi. fa.*, the commission having been issued upon an act of bankruptcy prior to the *fi. fa.* The defendants had not any notice of the bankruptcy until after the levy, and they had paid over the proceeds to an execution creditor under an indemnity. It was first objected, that the plaintiff, by suing in form *ex contractu*, thereby treated the sheriff as his agent and affirmed all his previous acts; to which it was answered and resolved, that the plaintiff did not do so; he merely waived his claim to damages for a wrong, and sought to recover only the proceeds of the sale. Secondly, it was objected, that the action was too late, after the sheriff had paid the money over in obedience to the writ. But it was resolved, that money paid over on an indemnity might be considered as not having been paid over at all. It was also objected, that the property had been changed by the sale, to which it was answered, *per Alderson, J.*, that although the property was changed as between a purchaser and the parties against whom the execution had issued, yet it was not changed against a party whose goods had been wrongfully taken (*z*).

14. In order to sustain this action, there must be a privity between the plaintiff and defendant (*a*).

If I give a sum of money to my servant to pay a tradesman, the tradesman cannot maintain an action for money had and received against the servant (*b*). So if a country client, a defendant in a cause, employs a country attorney, who in his turn employs his

(*x*) *Acc. Cocks v. Masterman*, 9 B. & C. 902; *Smith v. Mercer*, 6 Taunt. 76, *per Gibbs, C. J.*

(*y*) *Wilkinson v. Johnson*, 3 B. & C. 428. See *Roberts v. Tucker*, 16 Q. B. 560.

(*z*) *Young v. Marshall*, 8 Bing. 43; *Notley v. Buck*, 8 B. & C. 160.

(*a*) *Jones v. Carter*, 8 Q. B. 134. See *Calland v. Lloyd*, 6 M. & W. 26.

(*b*) *Per Parke, J.*, 4 B. & Ad. 612.

town agent to conduct the cause, and the town agent in the course of his business receives money the proceeds of the cause, the country client cannot recover such sum in an action for money had and received against the town agent, for there is no privity (*c*). So where the solicitor to the assignees of a bankrupt had received from them money to be applied in payment of the costs of the petitioning creditor, up to the time of the choice of assignees, and thereupon the solicitor offered to pay the money, on condition that the bill shall be subject to further taxation, which was refused. The petitioning creditor sued the solicitor for money had and received. There was not any proof that the commissioners had ascertained the amount of the costs according to the statute; this the judge thought necessary, and nonsuited the plaintiff; and the court afterwards, upon consideration, confirmed the nonsuit; inasmuch as the defendant had received the money as the agent of the assignees, and not of the plaintiff; he held it subject to their control and directions, and would continue to be accountable to them, until he entered into some binding engagement with the plaintiff to hold it for his use (*d*). Where money, or something productive of money, *e.g.*, a bill of exchange or a cargo of goods, is remitted by A. to B., with directions to pay it to C., C. cannot maintain an action against B. for money had and received, without something having been done by B. which amounts to a privity or assent (*e*), independent of the mere receipt of the money, realisation of the goods, &c. (*f*); but where such assent has been given, it becomes an appropriation irrevocable (*g*), except by the consent of all the parties (*h*).

15. The consideration of this action must be *money*. Hence stock cannot be recovered in an action for money had and received, stock being a new species of property, and not money (*i*). But where, upon a wager of ten guineas to one, the stakeholder received country bank-notes, and paid them over wrongfully to the party who had lost the wager; it was held, that an action for money had and received would lie at the suit of the winner; Lord *Ellenborough*, C. J., observing, that provincial notes were certainly not money: yet, if the defendant received them as money, and all parties agreed to treat them as such, at the time, he should not be

(*c*) *Cobb v. Becke*, 6 Q. B. 931.

(*d*) *Baron v. Husband*, 4 B. & Ad. 611; see *Howell v. Batt*, 5 B. & Ad. 504.

(*e*) Facts insufficient to constitute such assent. *Malcolm v. Scott*, 5 Exch. 601; *Blackledge v. Harman*, 1 M. & R. 346. Facts sufficient. *Bedford v. Perkins*, 3 C. & P. 90; *Lilly v. Hays*, 5 A. & E. 549; *De Bernaldes v. Fuller*, 14 East, 591, n.; *Fruhling v. Shreder*, 2 Scott, 135; *Moore v. Bushell*, 27 L. J., Exch. 3.

(*f*) *Williams v. Everett*, 14 East, 582; *Brind v. Hampshire*, 1 M. & W. 365.

(*g*) *Hodgson v. Anderson*, 3 B. & C. 842; *Yates v. Hoppe*, 9 C. B. 441; *Hutchinson v. Heyworth*, 9 A. & E. 404; *Hamilton v. Spottiswoode*, 4 Exch. 200. *Secus*, it seems, of a mere mandate to pay; which is revocable. *Dickinson v. Marrow*, 14 M. & W. 718; *sed quære*, see cases *supra*.

(*h*) *Walker v. Rostron*, 9 M. & W. 411. See further on this position, pp. 62, 124.

(*i*) *Nightingale v. Devisme*, 5 Burr. 2589. See also *Jones v. Brinley*, 1 East, 1, pp. 62, 124.

permitted to say, that they were only paper, and not money. As against him, it was so much money received by him (*k*). So where an insurance broker having received credit in account with an underwriter for a loss, upon a policy, whereupon the name of the underwriter was erased from the policy; it was held, that the insured might maintain an action for money had and received against the broker, although he had not actually received any money from the underwriter; for the broker having deprived the plaintiff of his remedy against the underwriter, and having received credit in account for the money, he was estopped from saying that he had not the sum in his hands for the plaintiff's use (*l*). But no security or equivalent for money can form the subject-matter of this action, unless the parties have treated it as money, or facts exist sufficient to raise an inference, that it has been converted into money (*m*). Hence this action will not lie to recover the value of foreign securities paid to the defendant, where it appears, that he had not any opportunity of converting such securities into British money (*n*).

Payment to Agent.—It is a general rule, that in cases of payment to a known agent, the action for money had and received ought to be brought against the principal (*o*); but where the payer becomes entitled to recall the money, he may, if the agent refuse to refund, sue him, provided he has not paid the money over to his principal or allowed it in account under circumstances which amount to payment (*p*). A., as receiver of W., received money for quit rents due to W., and gave a receipt for them as such. An action for money had and received having been brought against A., to try W.'s right to the quit rents, it was held, that the action would not lie, and that it ought to have been brought against W.; the court observing, that in cases of payment to a known agent, the action ought to be brought against the principal, unless in special cases, as under notice, or *malâ fide* (*q*). An action for money had and received does not lie against an excise officer to recover duties voluntarily paid to him after the act imposing them is repealed, if the officer has paid them over to his superior, and so no action will lie against the receiver of excise who has received and paid over duties illegally levied by an excise officer (*r*). So where a sum of money had been paid to a churchwarden for burial dues, which he afterwards without notice paid over to the treasurer of the trustee of the chapel, to which the burial ground belonged; it was held, that money had and received would not lie

(*k*) *Pickard v. Bankes*, 13 East, 20; *Spratt v. Hobhouse*, 4 Bingh. 179; *per Best*, C. J.

(*l*) *Andrew v. Robinson*, 3 Camp. 199.

(*m*) *Powell v. Rees*, 7 A. & E. 426.

(*n*) *M'Lachlan v. Evans*, 1 Y. & J. 380.

(*o*) *Stephens v. Badcock*, 3 B. & Ad.

354; *Duke of Norfolk v. Worthy*, 1 Campb. 339; *Bamford v. Shuttleworth*, 11 A. & E. 926.

(*p*) *Holland v. Russell*, 4 B. & S. 14.

(*q*) *Sadler v. Evans*, 4 Burr. 1984; Bull. N. P. 133, S. C.

(*r*) *Greenway v. Hurd*, 4 T. R. 553; *Attlee v. Backhouse*, 3 M. & W. 648.

against the churchwarden (*s*). So where too large a sum had been received for freight, through a mistake in measurement, by the defendants, shipbrokers, and they had settled accounts with the shipowner in the *bond fide* belief that the payment had been rightly made, it was held that the money could not be recovered back from them, although it might from the shipowner (*t*). So where the known agent of a foreign principal, before notice of repudiation of a contract of insurance on account of the non-communication of material facts, had paid over part, and credited in a settled account the remainder of the amount paid by the underwriters to him before they were aware of the facts, it was held that the agent was not liable to refund (*u*).

So where money had been deposited by a bankrupt after he had committed an act of bankruptcy, but before the fiat, in the hands of an arbitrator, who was to decide to whom it belonged, and pay it over, and he had so decided and paid it over without notice of the act of bankruptcy, it was held, that no action for money had and received would lie against the arbitrator (*x*). Although if money be paid by mistake to an agent, and conclusively allowed by him in account with his principal, but *not actually paid over*, money had and received will not lie against the agent; still the mere passing such money in account, or making rest, without any new credit given; fresh bills accepted or further sums advanced for the principal, in consequence of it, so as to alter the agent's condition, is not equivalent to a payment of it over (*y*).

To the general rule, that, in case of payment to a known agent, the action for money had and received ought to be brought against the principal, there is this exception:—where a person gets money into his hands *illegally*, he cannot discharge himself by paying it over to another. Thus, where an action was brought to recover back money paid to parish officers by the plaintiff, who had been taken into custody as the putative father of a bastard child. The money had been paid for the purpose of indemnifying the plaintiff against all future charges which might accrue in respect of the child. The child died before all the money was expended, and the defendants, the overseers, had paid over the surplus to their successors. It was held, that the contract was illegal, and therefore that the plaintiff could recover the money from the defendants (*z*). The plaintiff, being a prisoner in the Coldbath-fields Prison, of which the defendant was governor, contracted with the defendant for the purchase of an annuity, and paid him 750*l.* as a consideration for it. This annuity was afterwards set aside, and the plaintiff

(*s*) *Horsfall v. Handley*, 8 Taunt. 136.

(*t*) *Shand v. Grant*, 15 C. B. 324.

(*u*) *Holland v. Russell*, 4 B. & S. 14.

(*x*) *Tope v. Hockin*, 7 B. & C. 101.

(*y*) *McCarthy v. Colvin*, 9 A. & E. 607; *Buller v. Harrison*, Cowp. 566,

recognised in *Cox v. Prentice*, 3 M. & S. 344. But see *Holland v. Russell*, 4 B. & S. 14.

(*z*) *Townson v. Wilson*, 1 Campb. 396; *acc. Watkins v. Hewlett*, 1 B. & B. 1; *Clarke v. Johnson*, 3 Bingh. 424.

called on defendant to refund. The defendant paid back 715*l.* 15*s.*, but insisted that he was entitled to the remainder as due to him for the rent of a room, at one guinea per week, which plaintiff had been permitted to occupy during his residence in the prison. It was objected that, by the regulations of the prison, the gaoler had no authority to let any room upon such terms. As an answer to this, the prison books were produced, by which it appeared that the governor charged himself with the guinea per week, and accounted for it to the court; and one of the visiting magistrates of the prison was called, who said, he was aware that there were such rooms, and that no objection had ever been made, and that the gaoler's book had been regularly passed at the quarter sessions. *Kenyon*, C. J. — "I think this action may be maintained. I am aware it has been holden, in the case of *Sadler v. Evans*, 4 Burr. 1984, that an action cannot be brought against an agent for money had and received for the use of his principal, but in that case there was nothing corrupt in the foundation. This agreement is one of those which the law will not allow. Besides, the county is not a corporate body, and, therefore, cannot be sued, except in those cases where acts of parliament have made it expressly liable. I am of opinion, therefore, that the plaintiff, notwithstanding this money has been paid over to the county, is entitled to recover" (a). So, if a revenue officer seize goods as forfeited which are not liable to seizure, and take money of the owner to release them, the latter may recover back the money in an action against the revenue officer, and this whether he has paid the money over or not (b). So a payment to A., expressly as the agent of B., for the purpose of redeeming goods wrongfully detained by B., and a receipt by A. expressly for B., would still give a right of action against A. for money had and received (c); even although A. had paid over the money (d). So where the plaintiff paid a sum of money to a bailiff, who had exceeded his authority, under the terror of process, for the purpose of redeeming his goods, and not with an intent that the money should be delivered over to any one in particular; it was held, that the plaintiff might maintain an action for money had and received against the bailiff, although the bailiff had in fact paid the money over to the sheriff, and the sheriff to the exchequer (e). So where the receipt of the money was wrongful, as by an agent of the executor receiving the money of a testatrix, and paying it over to the executor, neither being entitled to it, such payment over will be no defence to an action for money had and received by the rightful owner (f). So where the payment over of

(a) *Miller v. Aris*, B. R. Middx. Sitt. after M. T. 41 Geo. III. MS.

(b) *Irving v. Wilson*, 4 T. R. 485; per Parke, B., in *Attlee v. Backhouse*, 3 M. & W. 648.

(c) *Per Cur.* in *Smith v. Sleep*, 12 M. & W. 588.

(d) *Oates v. Hudson*, 6 Exch. 346.

(e) *Snowdon v. Davis*, 1 Taunt. 359.

(f) *Trugman v. Hopkins*, 4 M. & G. 389; acc. *Robins v. Heath*, 11 Q. B. 248. That in such a case the action would not lie against the agent if the receipt was right; see *Barlow v. Browne*, 16 M. & W. 126.

the money was wrongful, as by an auctioneer of a deposit on a sale of land before the sale was completed (g).

These cases must, however, be distinguished from those where the money has been paid over to the defendant apparently as an agent but in reality as a stakeholder. A dispute having arisen between the plaintiff and a railway company, whether he was entitled to be registered as a shareholder for 200 shares in the company, a deposit of 400*l.* on account of such shares was by agreement deposited in the hands of the defendant, the secretary of the company, which was to be returned if the plaintiff failed to make out his claim to be registered. The memorandum of deposit, embodying the above arrangement, was signed—"J. R. C., secretary." The plaintiff paid the 400*l.* to the defendant, and the defendant paid it into a bank to his own private account, and subsequently left the employment of the company. The plaintiff never was registered as a shareholder, and applied to the defendant for the money. On an action being brought to recover this money from the defendant, *Tindal*, C. J., was of opinion that the money had been deposited with the defendant in his individual character as a stakeholder, and the court confirmed this decision (h).

J., an attorney, who was accustomed to receive dues for the plaintiff his client, went from home, leaving B., his clerk, at the office; who, in his master's absence, received money on account of the above dues, (which he was authorised to do,) and gave a receipt signed "B. for Mr. J." B. afterwards refused to pay the money over to the plaintiff, who thereupon brought an action for money had and received against B.; but it was held, that it would not lie; B. received the money as the agent or the servant of J., and must have paid it over to him if he had returned: there was no privity of contract between B. and the plaintiff, the privity of contract was between B. and J., and between J. and the plaintiff (i). And the court distinguished it from the case of *Stead v. Thornton* (k), where a party had received money belonging to a bankrupt's estate in the character of agent to the late assignee, and the question was, whether the present assignee could recover it in this action. It was held, that as the late assignee was a lunatic when he received the money, and *could* not have an agent, the money was received by the defendant without authority, and the defendant held it as a mere stranger. *Acc. Robbins v. Fennell*, 11 Q. B. 248, where it was held that if the town agent of a country attorney receive money, the proceeds of an action, *without authority*, either from the country attorney or from the client of the country attorney, such client

(g) *Gray v. Gutteridge*, 1 M. & R. 614; *Edwards v. Hodding*, 5 Taunt. 815.

(h) *Baird v. Robertson*, 1 M. & G. 931; and see *Bamford v. Shuttleworth*,

11 A. & E. 926.

(i) *Stephens v. Badcock*, 3 B. & Ad. 354; see *Bamford v. Shuttleworth*.

(k) 3 B. & Ad. 357, n.

may recover it in an action for money had and received against the town agent ; although generally there is not such a privity between a client who employs a country attorney, who in his turn employs the London attorney, as to enable the client to bring such an action against the London agent (l).

An agent must account to his principal, and cannot set up the *jus tertii* in an action by his principal against him (m). An agent to receive for the use of another cannot, by a notice from a third person, be converted into an implied trustee ; his possession is the possession of the principal. Defendant, an auctioneer, was employed by C., a person in embarrassed circumstances, to sell his property ; defendant sold, and paid the proceeds to C.'s order. C. having shortly afterwards been declared insolvent, it was held, that although the defendant was aware of C.'s embarrassment when he sold the property, yet he was not liable to C.'s assignee (n).

But where the plaintiff's possession of the goods arises out of a fraud concerted between him and the insolvent, the argument as to the *jus tertii* does not arise. The defendant was employed by the plaintiff to sell, as auctioneer, certain goods then in the plaintiff's possession. Before the sale, notice was given to the defendant by the assignees of the insolvent, that the goods were their property as such assignees, and that they had been fraudulently removed by collusion between the plaintiff and the insolvent. The defendant, after that notice, sold the property, and rendered an account of the sale of it to the plaintiff, but afterwards, on an indemnity being given to him by the assignees, he refused to pay over to the plaintiff the money arising from the sale. An action for money had and received being brought against him by the plaintiff, the defendant set up the right of the assignees ; the jury found the fraud, and a verdict for the defendant, which the court refused to set aside, on the ground that if the insolvent had put the goods into the defendant's hands, for sale, the assignees might have interposed and claimed the produce from the defendant ; and that the insolvent could not have maintained this action after such claim ; and that the plaintiff, who took the goods by a fraud between him and the insolvent, could not be in a better situation than the insolvent himself (o).

On an account stated.—The production by plaintiff of an "I O U" signed by the defendant, but without any address, is *prima facie* evidence that it was given to the plaintiff by the de-

(l) *Cobb v. Becke*, 6 Q. B. 931.

(m) *Myler v. Fitzpatrick*, 6 Madd. 360 ; *Hawes v. Watson*, 2 B. & C. 540 ; *Dizon v. Hamond*, 2 B. & Ald. 310 ; *Roberts v. Ogilby*, 9 Price, 269 ; *Gosling v. Birnie*, 7 Bing. 339. See *Lee v.*

Bryes, 18 C. B. 599 ; *Scott v. Crawford*, 4 M. & G. 1031 ; *Cheesman v. Exall*, 6 Exch. 341.

(n) *White v. Bartlett*, 9 Bingh. 378.

(o) *Hardman v. Wilcock*, 9 Bing. 382, n. See *Story on Agency*, s. 217.

fendant, and of an account stated with him (*p*); and if the defendant wishes to rebut the inference arising from its production by the plaintiff, he should show that it had been in the hands of some other party (*q*).

In an action upon an account stated, it is not necessary to prove the items of the account, but only that an account was stated, for that is the cause of action (*r*). The accounting, being the ground of the promise, is traversable (*s*). A plea, therefore, that the defendant did not account would (*seem*) be good; see schedule (B.) to 15 & 16 Vict. c. 76. As, however, the issue is not simply whether there was an account stated, but whether the defendant was *indebted* on an account stated or not, the defendant may show, under the general issue, that the accounts, the correctness of which he has admitted, were in fact incorrect (*Thomas v. Hawkes*, 8 M. & W. 140); the plea of "never indebted" is therefore the best form to adopt. On an account stated, the plaintiff is not obliged to prove the exact sum laid in the declaration (*t*). An acknowledgment by the defendant of a debt (unless secured by deed (*u*)), due upon any account, is sufficient to enable the plaintiff to recover upon a count for an account stated (*x*). "I think *Knowles v. Michel* is an authority to show, that though in form a count upon an account stated is 'of and concerning divers sums of money,' yet proof of one item is good to maintain such a count; *divers* may be supported by evidence of one." *Per* Lord *Ellenborough*, C. J. (*y*). "It has been held, that upon a count for goods sold and delivered, the plaintiff may prove the sale of one article, and that will be well enough. The same rule applies to this count, which is 'of and concerning divers sums,' as to the count for goods sold." *Per* *Holroyd, J.*, *S. C.*

The acknowledgment must be of a subsisting debt. Where the defendant verbally agreed to purchase of the plaintiff the lease and goodwill of his premises, and on being asked for a deposit gave an I O U for 25*l.*, but afterwards refused to complete the purchase, it was held that the production of the I O U and the proof of the circumstances were not sufficient evidence of an account stated, as there was no debt due at the time the I O U was given (*z*). Where a party examined before commissioners of bankrupts merely admitted that he had received a sum of money on account of the bankrupt after an act of bankruptcy; it was held, that this was not evidence sufficient to support a count on an account stated with the assignees, as there was no admission of a

(*p*) Not of money lent, goods sold, &c. *Fesenmayer v. Adcock*, 16 M. & W. 449.

(*q*) *Curtis v. Rickards*, 1 M. & G. 46.

(*r*) *Bartlett v. Emery*, 1 T. R. 42, n.

(*s*) *Dalby v. Cooke*, Cro. Jac. 234.

(*t*) *Thomson v. Spencer*, Bull. N. P. 129.

(*u*) *Middleditch v. Ellis*, 2 Exch. 625; *S. C.* 17 L. J., Exch. 365.

(*x*) *Knowles v. Michel*, 13 East, 249.

(*y*) *Highmore v. Primrose*, 5 M. & S. 67.

(*z*) *Lemere v. Elliot*, 6 H. & N. 656; 30 L. J. 350, Ex.

subsisting debt (a). *Secus*, if a bankrupt under examination admit that a certain sum is *due* to A. (b), subject of course to be rebutted (c). So where the defendant, who had indorsed a bill of exchange to the plaintiff, told him, *before* the bill became due, that he need not give him notice of dishonour; that he knew the bill would not be paid; and that he would send the plaintiff the money in part payment of the bill on a future day, it was held that this was not an admission of a subsisting debt, but only a strong expression of opinion that the bill would be dishonoured, and a promise, *if* that event occurred, to pay the plaintiff (d).

The admission must be of a debt in fact due; a mere promise to pay a supposed debt will not support the count. Thus, where executors applied 200*l.* in part payment of a legacy, and promised payment of the remainder, but the legacy was in fact invalid under the Wills Act, 1 Vict. c. 26, it was held, that an account stated would not lie against the executors for payment of the remainder (e).

The admission must be absolute and unqualified. Where the plaintiff had done certain repairs to a house which he held of the defendant, and the defendant, when applied to for payment, said, "I cannot pay you now, but I will out of the next rent," this was held an unqualified admission (f). But where the plaintiff demanded 40*l.* on an agreement by the defendant, an incoming tenant, to pay for the growing crops, &c., on the farm, and the defendant offered to pay 17*l.*, it was held to be no evidence of an account stated, but only an offer to purchase peace, and escape an action (g). So a promise to give a cheque or pay a sum of money, on receiving an indemnity, is not sufficient (h). So where the defendant said, "He would have paid the plaintiff *if* he had not removed the grates" (i). So where the acceptor of a bill of exchange, on being applied to for payment, objected, that his acceptance had been altered by the substitution of a different place for payment, and that he should in consequence take such steps as the law would authorize. "He had been prepared for payment, and the party might have his money by calling at Bulbrook," it was held, that this was not an absolute admission, but one conditioned on the other party doing something; *viz.*, coming to Bulbrook (k). So where the admission was made by the defendant in her own right, but it turned out that the debt was due from her as the executrix of her deceased husband (l).

The admission must be made to the plaintiff or his agent (m);

(a) *Tucker v. Barrow*, 7 B. & C. 623.

(b) *Eicke v. Nokes*, 1 M. & R. 359.

(c) See *per Abinger*, C. B., in *Lubbock v. Tribe*, 3 M. & W. 607.

(d) *Burgh v. Legge*, 5 M. & W. 418.

(e) *Gough v. Findon*, 7 Exch. 48.

(f) *Seago v. Deane*, 4 Bingh. 459.

(g) *Wayman v. Hilliard*, 7 Bingh. 101.

(h) *Lubbock v. Tribe*, 3 M. & W. 607.

(i) *Evans v. Verity*, R. & M. 239.

(k) *Calvert v. Baker*, 4 M. & W. 419.

(l) *Petch v. Lyon*, 9 Q. B. 147.

(m) *Per Parke*, B., in *Hughes v. Thorpe*, 5 M. & W. 667.

an admission made to a third party will not suffice (*n*). It must be stated with reference to former transactions between the parties; *per Lyndhurst, C. B. (o)*, in a case in which it was held, that an agreement by the assignees of an insolvent tenant (who—*i.e.* the assignees—had not occupied the land) to pay the last quarter's rent, in consideration of being allowed to remove the fixtures, was not evidence of an account stated. And it must be of a sum *certain*. Where the defendant wrote to the plaintiff as follows: "Please debit me with the amount of the calls due; I *think* it will be 500*l.*, &c.," it was held to be no admission of a sum *certain* being due (*p*).

Where an account, consisting of various items, was shown to the defendant, and he objected to some of them, but made no remark with respect to the rest, this was held to be evidence to go to the jury of an account stated, with regard to those items to which no objection was made (*q*). Where on the trial of an indictment before the court of Quarter Sessions, the prosecutor said he should press for judgment (the defendant not having pleaded in proper time), unless the defendant agreed to pay the costs of the day, and ultimately an agreement was come to, and the following memorandum was signed by the respective counsel: "Traversed to the next sessions by consent, the defendant paying the costs of the day, including counsel's fees, &c;" and the prosecutor got his costs taxed, and applied to the defendant for payment, and the defendant objected to two items, which were abandoned; and on a subsequent application by the prosecutor's attorney, requested the latter to apply to B., who received his (the defendant's) rents, "*who would arrange or pay*," it was held, that this was evidence to go to the jury of an account stated (*r*).

Although no action might lie on the original debt or contract, from the deficiency of legal evidence to support it, *e. g.*, for want of its being in writing under the Statute of Frauds, yet it may on the admission upon an account stated, if the defendant has received the benefit of the contract, and has subsequently admitted his liability (*s*). *Secus*, "where the original debt is absolutely void from any illegal or immoral consideration, or where it is made void by any statute, as by those against usury (*t*) or gaming" (*u*). In one case (*v*) it was held, that an attorney's bill cannot be recovered on an account stated, though the amount has been admitted, without proof of a due delivery of the bill, in accordance with the 2 Geo.

(*n*) *Breckon v. Smith*, 1 A. & E. 488.

(*o*) *Clarke v. Webb*, 1 C., M. & R. 29;
s. v. *Liddard v. Holmes*, 2 C., M. & R.
586.

(*p*) *Hughes v. Thorpe*, 5 M. & W. 667.

(*q*) *Chisman v. Count*, 2 M. & G. 307.

(*r*) *Porter v. Cooper*, 1 C., M. & R.
387, And see *King v. Taylor*, 2 *ib.*,

235; *Barker v. Birt*, 10 M. & W. 61.

(*s*) *Cocking v. Ward*, 1 C. B. 858;
Lord Falmouth v. Thomas, 1 C. & M.
89.

(*t*) Repealed, 17 & 18 Vict. c. 90.

(*u*) *Per Cur.* in *Cocking v. Ward*.

(*v*) *Eicke v. Nokes*, 1 M. & Rob. 359.

II. c. 23 (*w*). But it would seem, from later cases, that this decision cannot be supported, as the defence cannot be set up under the general issue (*x*).

Whether the making of a note, as between the maker and the payee;—the accepting of a bill, as between the acceptor and the payee, if he be also the drawer;—the indorsement of a bill or note, as between the indorser and his immediate indorsee,—is evidence of an account stated, *quære*. *Semble*, that it is (*y*). If the maker, acceptor, or indorser, in such a case, on being shown the bill or note, admit his liability to pay, only alleging his inability, there is evidence of an account stated (*z*). The acceptance of a bill is not such evidence as between the payee and the acceptor, if it be *drawn* by a third person (*a*).

III. Of the Declaration.

Venue.—The action of assumpsit, being founded on contract, is transitory; *Debitum et contractus sunt nullius loci*, 2 Inst. 230; and consequently the venue may be laid in any county at the election of the plaintiff.

By 1 Pl. R. Hil. T. 1853, it is ordered, that several counts on the same cause of action shall not be allowed (*b*); nor shall several pleas, replications, or subsequent pleadings, or several avowries or cognizances founded on the same ground of answer or defence.

Application may be made to the court or a judge to strike out such counts, pleas, &c., upon terms as to costs, but if no such order about costs has been made, and “on the trial there is more than one count, plea, &c., on the record, founded on the same cause of action or ground of answer or defence, and the judge or presiding officer before whom the cause is tried shall at the trial certify to that effect on the record, the party so pleading shall be liable to the opposite party for all costs occasioned by such count, plea, or other pleading in respect of which he has failed to establish a distinct cause of action or distinct ground of answer or defence, including those of the evidence, as well as those of the pleading.” R. 3.

Where an action is brought in an inferior court, it must be stated in the declaration, that the *cause of action* accrued within

(*w*) Repealed by 6 & 7 Vict. c. 73. See s. 37. And see *Barker v. Birt*, *supra*.

(*x*) *Robinson v. Roland*, 6 Dowl. 271.

(*y*) *Highmore v. Primrose*, 5 M. & S. 67; *Priddey v. Henbrey*, 1 B. & C. 674; *Early v. Bowman*, 1 B. & Ad. 889; and

see *Hatch v. Trayes*, 11 A. & E. 702.

(*z*) *Highmore v. Primrose*.

(*a*) *Early v. Bowman*.

(*b*) See *Bleaden v. Rupaillo*, 3 M. & G. 116; *Deere v. Ivey*, 4 Q. B. 379.

the jurisdiction. Hence in assumpsit in an inferior court, not the promise only, but the consideration also, on which such promise is founded, must be laid within the jurisdiction (*c*); for the inferior court cannot hold plea unless the *whole matter* is within their jurisdiction (*d*); consequently, if a declaration for goods sold and delivered (*e*), or money had and received (*f*), or money paid (*g*), do not state the sale and delivery of the goods, or the receipt or payment of the money, to have been within the jurisdiction, it will be error, even after verdict; for in this case nothing shall be intended to be within the jurisdiction, that is not expressly averred to be so (*h*). When, however, a suit commenced by *justices* in the Sheriff's Court, is removed to the superior court by *pone*, the declaration in the superior court need not state the cause of action to have arisen within the inferior jurisdiction (*i*). Now, under most of the Small Debts Acts, the proceedings are by *plaint*, and no pleadings are necessary.

Time and Place.—Time is not material in an action of assumpsit (*k*), unless it be of the essence of the contract, and need not therefore be stated in the declaration (*l*), except in actions on bills of exchange or promissory notes (*m*). Nor is place material (*n*), unless it be of the essence of the contract. By the Pleading Rules of Hil. Term, 1853 (R. 4), it is provided, "That the name of a county shall in all cases be stated in the margin of a declaration, and shall be taken to be the venue intended by the plaintiff, and no venue shall be stated in the body of the declaration, &c.; provided that in cases where local description is now required such local description shall be given."

Manner of stating the contract.—The declaration must state the contract on which the action is founded correctly; that is, either in the terms in which it was made, or according to the legal effect of those terms; for a material variance between the contract alleged and the contract proved will be fatal (*o*); unless an amendment, "for the purpose of determining in the existing suit the real controversy between the parties," be duly applied for and made (*p*). As where the contract alleged was, to deliver good "*merchandizable wheat*," and the proof was to deliver good "*second sort*" of wheat, the plaintiff was nonsuited for the

(*c*) *Ramsay v. Atkinson*, 1 Lev. 50;
Whitehead v. Brown, 1 Lev. 96.

(*d*) *Drake v. Beare*, 1 Lev. 104, 105.

(*e*) *Waldock v. Cooper*, 2 Wils. 16.

(*f*) *Trevor v. Wall*, 1 T. R. 151.

(*g*) *Heaven v. Davenport*, 11 Mod. 365.

(*h*) *Winford v. Powell*, Lord Raym. 1310. *Per Atkins and Scroggs, Js.*, 2 Mod. 197.

(*i*) *Powell v. Ansell*, 3 M. & G. 171.

(*k*) *Cole v. Hawkins*, Str. 22.

(*l*) 15 & 16 Vict. c. 76, s. 49.

(*m*) *Stafford v. Forcer*, 10 Mod. 311, cited Str. 22; and see *Arnold v. Arnold*, 3 B. N. C. 84.

(*n*) *Bowdell v. Parsons*, 10 East, 359; 15 & 16 Vict. c. 76, s. 51.

(*o*) *Cooke v. Munstone*, 1 N. R. 351.

(*p*) 15 & 16 Vict. c. 76, s. 222; 17 & 18 Vict. c. 125, s. 96.

variance (*q*). So where the plaintiff declared upon a contract for wages upon a certain voyage from London to Africa, and thence to the West Indies; but the proof was of a contract for a voyage from London to Africa, and thence to the West Indies or America, *and afterwards to London, &c.*; the variance was held to be fatal, though the captain in fact put an end to the voyage in the West Indies, and discharged the crew there; the contract proved being for a different voyage than that declared on (*r*). So where the declaration stated a specific contract for the sale of a dwelling-house and fixtures, for the residue of a term of years, to commence from a certain day, in proof of which, the following paper, signed by the defendant, was given in evidence:—"I agree to sell the house and fixtures, No. 163, Piccadilly, to commence from the 2nd January next, for 60*l*." This was held to be a fatal variance, as showing a sale of a fee simple, or at least leaving it uncertain, what was the interest intended to be conveyed (*s*). But where a bill of exchange was drawn in this form: "Pay to our order," &c., and was signed in the name of two persons and Co., and accepted by the defendant; it was held, that in an action against the defendant as acceptor, it might be declared upon by the indorsees as a bill drawn by an aggregate firm; and although it was proved that the firm consisted of one person only, it was held not to be a variance, for the acceptor of a bill is estopped from denying the handwriting, &c. of the drawer (*t*).

The Consideration.—Every part of the entire consideration for any promise contained in the agreement must be stated in the declaration (*u*). But in framing a declaration on an agreement, which consists of several distinct parts and collateral provisions, it is not necessary to state in the declaration every part of such agreement:—"It is sufficient to state so much of the agreement as contains the entire consideration for the act, and the entire act which is to be done, in virtue of such consideration. The rest of the contract, which respects the liquidation of damages only, after a right to them has accrued by a breach of the contract, is matter proper to be given in evidence to the jury, but not necessary to be shown to the court in the first instance, on the face of the record" (*x*). In like manner, where the plaintiff states the whole consideration truly, and then states those parts of the defendant's promise, the breach of which he complains of, truly and correctly; that is sufficient, without stating other parts of the promise

(*q*) *Anon.*, Lord Raym. 735; *acc.* *Anon.*, Bull. N. P. 145.

(*r*) *White v. Wilson*, 2 B. & P. 116. See also *Penny v. Porter*, 2 East, 2.

(*s*) *Hughes v. Parker*, 8 M. & W. 244.

(*t*) *Bass v. Clive*, 4 M. & S. 13.

(*u*) *Fremien v. Hamilton*, 8 Exch. 308.

(*x*) *Per Cur.*, *Clarke v. Gray*, 6 East,

569, 570. "There are a great variety of agreements not under seal, containing detailed provisions regulating prices of labour, rates of hire, times and manner of performance, adjustments of differences, &c., which are every day declared upon in the general form of a count for work and labour." *Per Cur.*, *S. C.*

irrelevant to the breach complained of (*y*). "It is enough to state that part of the agreement truly which applies to the breach complained of, if that which is omitted do not qualify that which is stated" (*z*).

Idle and insufficient considerations do not form any essential part of the contract; consequently it is neither necessary to state them in the declaration, nor, if stated, to prove them (*a*). By the term "idle and insufficient considerations" must be understood such considerations as, if they stood alone, would not support the promise of the defendant. They are distinguishable from illegal considerations; for if one of the considerations, where there are two or more, is illegal, it will vitiate the whole contract, and the action cannot be supported; but an idle or insufficient consideration may be rejected; in truth, it is a nullity (*b*).

Executory considerations are traversable (*c*), and where the promise of the defendant is founded on two or more executory considerations, the performance of all must be expressly averred (*d*). Where the consideration is executed, as in the *indebitatus* counts, (in which case it is not traversable (*e*)), and the promise to pay a sum certain, or to do or forbear from doing some specific act, the declaration proceeds at once from the statement of the contract to the breach, without any intermediate averment.

Breach.—The breach may be co-extensive with the promise, but must not be enlarged beyond it (*f*). If the promise is in the disjunctive the breach should be so also. Thus, where, the promise was that if the defendant did not return some horses to the plaintiff by a day named in as good plight as they were at the time of lending, the defendant would pay him so much per horse. The breach assigned was, that one of the horses was detained so many days beyond the time named, and that the other had not been returned at all. After verdict for the plaintiff, judgment was arrested, because the breach was not laid according to the promise (*g*). It will be sufficient, however, if the breach pursue the words of the promise (*h*).

Notice.—*Averment thereof*.—Where the action does not lie without notice given to the defendant, an averment of such notice

(*y*) *Miles v. Sheward*, 8 East, 7.

(*z*) *Tempest v. Rawling*, 13 East, 18.
See also *Cotterill v. Cuff*, 4 Taunt. 285.
Per Parke, B., in *Smart v. Hyde*, 8 M. & W. 728.

(*a*) *Crisp v. Gamel*, Cro. Jac. 127.

(*b*) *Jones v. Waite*, 5 B. N. C. 341.

(*c*) *Sexton v. Miles*, Salk. 22.

(*d*) *Leneret v. Rivett*, Cro. Jac. 503.

(*e*) 1 Roll. Rep. 43, 401; *i. e.*, not traversable by itself, Hob. 106; the performance of the consideration is, of

course, denied by the general issue, *Raikes v. Todd*, 8 A. & E. 854; and a traverse of an executed consideration in terms, *e. g.*, in an action for work and labour "that the plaintiff did not perform the work, &c.," would not, it seems, since the Common Law Procedure Acts, be objectionable.

(*f*) *Staynrode v. Locock*, Cro. Jac. 115.

(*g*) *Wright v. Johnson*, 1 Sid. 440.

(*h*) *Pilchard v. Kingston*, Cro. Car. 202.

ought to be inserted in the declaration (*i*). The defendant bought of the plaintiff a quantity of barley, and promised to pay him for it as much as he could get from any other person. The plaintiff averred in his declaration, that he afterwards sold the same quantity to J. S. for such a sum, but did not aver that the defendant had notice of the sum given by J. S. : for this omission the judgment was arrested; and this distinction was taken, that if the agreement had been that the defendant should pay as much as J. S. paid, in that case, *quia constat de personâ*, and he is indifferently named between them, the defendant at his peril should inquire of him, and the plaintiff was not bound to give notice; but where the person was altogether uncertain, there the plaintiff, to entitle himself to the action, ought to give notice (*k*). *Acc. Holmes v. Twist* (in error), Hob. 51, where an averment of notice was held necessary, on the ground that the matter rested in the privity and knowledge of the plaintiff alone. But where the consusance of the act to be done lies as well in the knowledge of the defendant as of the plaintiff, an averment of notice is not necessary; as where the act is to be done by a stranger (*l*), *i.e.*, a stranger named and agreed upon between the parties, agreeably to the distinction above mentioned. So, where an act is to be done by the plaintiff to a stranger, as where the declaration stated, that, in consideration that the plaintiff had agreed to deliver up a bond, by which one H. M. was bound to him in a certain sum of money, to the said H. M., the defendant promised to pay, &c., and averred that he delivered up the bond, yet, &c. An exception was taken, because it was not averred, that the plaintiff gave the defendant notice of his having delivered up the bond; but it was overruled, because the defendant at his peril ought to take notice of the obligation, as in a bond to stand to an award (*m*); for in such a case he may inquire of the arbitrators. *Per Powell, J.* (*n*).

Request.—When assumpsit is brought for a debt or mere duty, it is not necessary to make an actual request before action brought, and consequently an averment of such request in the declaration is unnecessary; for the bringing the action is a sufficient request (*o*). As where in assumpsit upon a promissory note, payable four months after date, it was objected in error, that the request to pay the money on the note was laid upon the same day and year that the note was dated, which was four months before it became due; to this it was answered and adjudged by the court, that

(*i*) It might, however, if omitted, be suggested by leave of the Court after verdict; 15 & 16 Vict. c. 76, s. 143. See *Fisher v. Bridges*, 22 L. J., Q. B. 274.

(*k*) *Hall v. Hemminge*, Cro. Jac. 432; 3 Bulst. 85, 6, 7, S. C.; *per Holt, C. J.*, *Smith v. Goffe*, Lord Raym. 1127; and

see *Brice v. Carre*, 1 Lev. 47.

(*l*) *Powle v. Hagger*, Cro. Jac. 492; *Juxon v. Thornhill*, Cro. Car. 132.

(*m*) *Smith v. Goffe*, Lord Raym. 1126.

(*n*) *Smith v. Goffe*. See also 8 Rep. 92, b.

(*o*) *Bartlett v. Bartlett*, Winch. 2; *Vivian v. Shipping*, Cro. Car. 385;

there was not any occasion to lay any request: that the bringing the action was a request in law, and it appeared that the action was not brought until above a year after the note was due (*p*). Where, however, the defendant is chargeable upon a collateral promise to pay money, do, or omit some act, *upon request*, and not for a mere debt or duty, an actual request ought to be made before action brought, and consequently, it ought to be averred in the declaration; for in such case the request is parcel of the cause of action (*q*). The averment, "*although requested*," is equivalent to an express averment, "the plaintiff, in fact, says," or other similar words (*r*).

Of Conditions precedent.—If A. promise to do, or to abstain from doing, a certain act, in consideration of the antecedent performance of some act or promise on the part of B., the promise of A. is called a dependent promise; because B.'s right of action for a breach of such promise depends on the prior performance (or that which is equivalent to performance) of the act or promise on the part of B.; and the act or promise to be performed by B., being in the nature of a condition precedent, is usually distinguished by this appellation, because the performance (or that which is equivalent to performance) of such act or promise, precedes B.'s right of action to recover damages against A. for the non-performance of his promise, and should be specially averred in the declaration (*s*).

The plaintiff declared that the defendant was possessed of 17 tod of wool, and that there was a conversation between them for 15 tod of the 17 *to be chosen by the plaintiff*; that the defendant, in consideration of a sum of money to be paid on such a day, promised to deliver to the plaintiff the aforesaid 15 tod of wool, and averred that he was ready at the day to pay the defendant the money, yet the defendant had not delivered the wool. After a verdict for the plaintiff, an exception was taken in arrest of judgment (*t*), because the plaintiff had not shown that he had chosen 15 tod of the 17, which is *quasi a condition precedent*, and an act to be first performed by the plaintiff before the defendant is bound to do any thing; which was assented to by the whole court (*u*). It is sufficient, however, to aver such performance generally (*x*), *e. g.*, "that the plaintiff hath done all things, and all

Wallis v. Scott, 1 Str. 88. Characterised by Austin as "a monstrous rule of the English law." Jurisprudence, vol. ii. p. 156.

(*p*) *Frampton v. Coulson*, 1 Wils. 33.

(*q*) *Birks v. Trippet*, 1 Wms. Saund. 32, *ibid. in notis*; *Royal Mail Steam Packet Company v. Acraman*, 2 Exch. 569; *Bach v. Owen*, 5 T. R. 409; *ante*,

p. 133, n. (*i*); *Rede v. Farr*, 6 M. & S. 121.

(*r*) *Kirley v. Lee*, 3 Leon. 67; *Bowdell v. Parsons*, 10 East, 359.

(*s*) See *ante*, p. 133, note (*i*).

(*t*) See now 15 & 16 Vict. c. 76, s. 143.

(*u*) *Raymay v. Alexander*, Yelv. 76.

(*x*) 15 & 16 Vict. c. 76, s. 57; *Kemble v. Mills*, 1 M. & G. 757; *Varley v. Manton*, 9 Bingh. 363.

things have happened, and all time has elapsed (*y*), necessary to entitle him to a performance by the defendant of the said agreement" (*z*), leaving the opposite party to *specify* the conditions precedent, the performance of which he intends to contest.

The case of *Thorpe v. Thorpe*, Lord Raym. 662, is a leading case on this subject. The declaration stated, that the defendant held of the plaintiff certain lands by way of mortgage, that the plaintiff *agreed* to make a good and sufficient release of his equity of redemption, *in consideration whereof* the defendant promised to pay to the plaintiff 7*l.*, yet, &c. It was resolved by the court, that, if there had been a positive agreement that the plaintiff should release the equity of redemption, and that the defendant should pay the money, the plaintiff might have maintained an action before he had made such release: but here the promise was "in consideration whereof," which made the release on the part of the plaintiff to be a condition precedent. *Holt*, C. J., then entered into the distinction between positive agreements and conditions precedent, and observed, that in the case of conditions precedent, an action could not be maintained before *performance*; but in the case of positive agreements it was otherwise: he then laid down the following rules (*a*):—

1. "If a day be appointed for payment of the money, and the act for which the money is to be paid, cannot" (or may not (*b*)) "be done *before* the day appointed, then, though the agreement be to pay the money for the doing of the thing, yet the action may be brought for the money before the thing is done: because the agreement is positive, that the money shall be paid at the day appointed:" and the promise of the plaintiff is a sufficient consideration for that of the defendant (*c*).—Thus, where the plaintiff agreed to sell land to the defendant, and to deliver an abstract of title within one month from the date of the contract, *or from being required so to do*, and the defendant agreed to pay the purchase-money partly on the signing of the contract, and the remainder at a fixed date subsequently; it was held, that, as the day for the payment of the remainder of the purchase-money *might* occur before the day for the delivery of the abstract (*e.g.*, if the vendee never required it), such delivery was not a condition precedent to an action for the price (*d*). And so it is if a certain day be fixed for the payment of the money, or any part of it, and *no time* is fixed for the performance of the consideration; as, where the

(*y*) *Stavart v. Eastwood*, 11 M. & W. 197; 15 & 16 Vict. c. 76, Sched. B. Form 22.

(*z*) See *Bentley v. Dawes*, 8 Exch. 666; *Phelps v. Prothero*, 16 C. B. 395, *per Jervis*, C. J.; 24 L. J., C. P. 225, S. C.

(*a*) See 1 Wms. Saund. 319 l. *Post*, tit. "Covenant," and cases there. There

is no distinction between assumpsit and covenant in this respect; see *per Holt*, C. J., in *Thorpe v. Thorpe*, *supra*; *per Parke*, B., in *Wilks v. Smith*, 10 M. & W. 355.

(*b*) *Campbell v. Jones*, 6 T. R. 570.

(*c*) *Wilks v. Smith*, 10 M. & W. 355; and see *Smith v. Woodhouse*, 2 N. R. 233.

(*d*) *Dicker v. Jackson*, 6 C. B. 103.

plaintiff agreed to sell land to the defendant, which was to be paid for within four years, with interest at five per cent. till paid, but no time was fixed for the conveyance of the land; it was held, that an action would lie within the four years for the arrears of interest, and that readiness and willingness to convey on the part of the plaintiff was not a condition precedent to his right to bring such action (*e*).

2. "Though a day certain be appointed for payment of the money, yet if the day is to occur *after* the time in which the consideration ought to be performed, for which the money should be paid, the performance of the consideration ought to be averred in an action brought for the money."—Thus, where an action was brought on an agreement by the plaintiffs to sell to the defendants cable bars, "to be delivered forthwith to the defendants at the works, the price to be paid by the defendants in cash in fourteen days from the making of the contract;" it was held, that the intention of the agreement was that the cable bars should be delivered by the plaintiffs within the fourteen days, and, therefore, that a readiness on the plaintiffs' part to deliver the goods was a condition precedent to an action for the recovery of the price (*f*).

With respect to the reasonableness of the above rules, the Chief Justice observed,—“That the bargain of every man ought to be performed as he understood it; and if a person will make such an agreement as to pay his money before he has the things for which he ought to pay, and will rely upon the remedy he has to recover the said thing, he ought to perform his agreement. But, on the other hand, if his agreement was otherwise, there is no reason that he should be compelled to give credit where he did not intend it.”—And this is now well established, that the intention of the parties is the governing principle in determining whether a particular stipulation is a condition precedent or not (*g*). Thus; where an action was brought on an agreement “to give yearly free to the plaintiff during three years twenty tons of coals, to be put free on board ship at Cardiff, for the use of the plaintiff;” it was held, that the naming of a ship to receive the coals was a condition precedent to the plaintiff's right to sue for their non-delivery. *Coleridge, J.*, said, “Where circumstances left uncertain by the contract are of such a nature that one party cannot perform his part of the contract until they are fixed, the other party insisting on the contract ought to fix those particulars” (*h*). And this intention is to be collected partly from the terms of the contract itself, and partly from the circumstances under which it was made

(*e*) *Wilks v. Smith*, *supra*, and see *Smith v. Woodhouse*, *supra*.

(*f*) *Staunton v. Wood*, 16 Q. B. 638.

(*g*) See *post*, p. 142, and *Thornton v. Jenyns*, 1 M. & G. 166.

(*h*) *Armitage v. Insole*, 14 Q. B. 728.

and the object of the parties in making it, which may be shown by pleading (*i*) or in evidence (*k*).

Where an agreement goes only to part of the consideration on both sides, and may be compensated in damages, it is an independent contract, and not a condition precedent. Where the defendant covenanted to pay 500*l.* at certain specified times, in consideration of the plaintiff teaching him a peculiar method of bleaching linen, *and* permitting him to use his (the plaintiff's) patent; it was held, that the instruction of the defendant by the plaintiff in the method aforesaid was not a condition precedent to his recovering the unpaid portion of the 500*l.*, for the defendant had received part of the consideration, *viz.*, the permission to use the patent (*l*). "The reason of the decision" (in these cases), said *Parke*, B., in *Graves v. Legg*, "besides the inequality of damages, seems to be, that where a person has received part of the consideration for which he entered into the agreement, it would be unjust, that, because he had not the whole, he should therefore be permitted to enjoy that part without either payment or doing any thing for it;"—and after stating that such receipt might appear either from the agreement itself, whereby a valuable right is conveyed, as in the above case, or by an averment in pleading, the same learned judge said:—"When that appears it is no longer competent to the defendant to insist upon the non-performance of that which was originally a condition precedent, and this is more correctly expressed than to say, it was not a condition precedent at all" (*m*).

In cases of conditions precedent, as has been observed (*ante*, p. 133), performance must be averred in the declaration and proved, as in the case cited by Lord *Kenyon* in *Morton v. Lamb* (*n*), where a party was to pull down a wall, and *then* to be paid for it; the pulling down was a condition precedent to the right to enforce payment; and in such cases mere readiness and willingness is not sufficient. As, where the defendant covenanted to expend 100*l.* in improvements and additions to a dwelling-house, under the direction of a surveyor *to be appointed by the plaintiff*; it was held, that the appointment of a surveyor was a condition precedent, and that a mere readiness and willingness to appoint was not sufficient (*o*). Indeed, in cases of conditions strictly precedent, *i.e.*, where something must be *done* by the plaintiff before he can maintain the action (and these cases must be carefully distinguished from those of concurrent acts), mere readiness and will-

(*i*) *Graves v. Legg*, 9 Exch. 709.

(*k*) *Simpson v. Henderson*, M. & M. 300; *Mechelin v. Wallace*, 7 A. & E. 54.

(*l*) *Campbell v. Jones*, 6 T. R. 570; *s. v.*, *Glazebrook v. Woodrow*, 8 T. R. 366.

(*m*) *Graves v. Legg*, 9 Exch. 709; and see *The London Gas Light Company v. The Vestry of Chelsea*, 8 C. B. (N. S.)

215.

(*n*) 7 T. R. 125; and see *Raynay v. Alexander*, Yelv. 76; *Armitage v. Insole*, 14 Q. B. 728.

(*o*) *Coombe v. Green*, 11 M. & W. 480; and see *Hunt v. Bishop*, 8 Exch. 678; *acc. Thomas v. Cadwallader*, Willes, 496.

ingness can never be sufficient ; for, either the act to be done is wholly in the power of the plaintiff, and then, as will be seen from the cases above cited (and see *Smith v. Wilson*, 8 East, 437), he must perform it in order to maintain the action ; or, if it be in the power of the defendant to prevent him from performing it (as in the case of *Raynay v. Alexander*, *supra*), still he must do all he can to perform it, and, if prevented, must show that as an excuse for non-performance (*p*). By the terms of a contract certain works were to be done for the defendants by the plaintiffs, according to certain plans and specifications, and to be paid for by certain instalments, “ on production by the contractors to the defendants, or one of them, of the certificate of W. L. or other the surveyor for the time of the defendants, that they (the contractors) had duly and efficiently performed and completed such work to his satisfaction.” In an action upon this contract, the declaration averred that all things necessary had been done by the plaintiffs to entitle them to have the certificate of the surveyor, but that he had not given such certificate, but had wrongfully and improperly neglected so to do. It was held that, in the absence of collusion, the plaintiffs were not entitled to recover without producing the surveyor’s certificate, and that the defendants were not responsible for his refusal to give one (*q*). See *post*, p. 140.

Concurrent Acts.—Where it is agreed that two concurrent acts shall be performed, the one by A. and the other by B. at the same time, as in the ordinary case of sales of real or personal property, one party cannot maintain an action against the other without averring and proving performance, or that which is equivalent to performance, of his part of the agreement. “ If two men agree, one that the other should have his horse, and the other that he will pay ten pounds for it, an action does not lie for the money until the horse be delivered.” *Per Holt*, C.J. (*r*). And it is the

(*p*) Considerable confusion and difficulty arises in the books from the application of the same term of “condition precedent” both to cases of conditions precedent properly so called, *i. e.*, cases where performance (or in certain cases an excuse for non-performance) must be proved, and cases of concurrent acts (and dependent acts are the same in this respect, *Goodison v. Nunn*, 4 T. R. 761), where a readiness to perform only is sufficient ; as, where A. agrees to sell goods to B. for a certain sum of money. In the latter case it is obvious neither party can maintain an action against the other without showing a readiness to perform his own part of the agreement. B. cannot sue A. for non-delivery of the goods without showing that he was ready to pay for them ; nor can A. sue B. for non-

payment without proving that he was ready to deliver them. In cases, however, of conditions precedent properly so called, although one party cannot bring the action without proving an actual performance (or an excuse for non-performance), the other party may sue him without showing anything ; as in the above case cited from *Morton v. Lamb*, an action would lie for not pulling down the wall, without proving a readiness to pay the money ; or, as in *Coombe v. Green*, for not appointing a surveyor, without averring a readiness to repair : and this would seem the proper test whether any condition is a precedent one strictly so called or not.

(*q*) *Clarke v. Watson*, 18 C. B. (N. S.) 278, 34 L. J. 148 C. P.

(*r*) *Thorpe v. Thorpe*, Lord Raym. 662.

same whether the two cotemporaneous acts are to be done at an indefinite time, or on a specified day. *Per Parke, B. (s).*

It is in general sufficient in such cases to show readiness and willingness on the part of the plaintiff to perform his part of the agreement (*t*); though in some cases something more, *e. g.*, a tender, is requisite (*u*). In an action for the non-delivery of goods on request, it is sufficient if the plaintiff was ready and willing to accept them in accordance with the contract, and pay for them at the stipulated price (*x*); and no tender or offer of the money is necessary (*y*). A readiness to receive only is not sufficient (*z*). So in an action for the non-acceptance of stock, it is sufficient if the plaintiff be ready and willing to deliver it, and a tender is not necessary (*a*). In sales of real estate, it is sufficient, in an action for the price, if the vendor is ready and willing to execute a conveyance (*b*); for in the absence of any express stipulation, it is the duty of the purchaser to prepare it; and therefore in an action by *him* for the non-completion of the contract, a tender of a conveyance (or a discharge from such tender (*c*)), must be shown. In cases between lessor and lessee, it seems it is the lessor's duty to prepare the lease (*d*); but at all events, if there be an express stipulation that the lease should be prepared "at the sole expense of the lessor," it must, in the absence of any thing in the agreement to the contrary, be intended to be his duty to prepare it; and, therefore, in an action by the lessee on such an agreement, no tender need be made (*e*). The rule that prevails between vendors and vendees of land, *viz.*, that the purchaser should prepare the conveyance, applies to sales of railway shares; the purchaser therefore in an action for non-delivery, must prove a tender of a transfer deed (*f*). So in the case of a sale of leasehold property, in which case a readiness and willingness on the part of the vendor to assign, is sufficient in an action for the non-payment of the price, and no tender of an assignment need be made (*g*).

Readiness and willingness is proved by the demand made on the defendant to fulfil his part of the agreement (*h*). The demand must be made at the proper time. Thus, in an action for not accepting stock, where the contract was to be performed on the 5th of

(s) *Laird v. Pim*, 7 M. & W. 485.

(t) *Levy v. Lord Herbert*, 7 Taunt. 314; *per Parke, B.*, in *Pickford v. Grand Junction Railway Company*, 8 M. & W. 378; *Phelps v. Prothero*, 16 C. B. 370; *Kemble v. Mills*, 1 M. & G. 757.

(u) *Poole v. Hill*, 6 M. & W. 835; and see *Fell v. Knight*, 8 M. & W. 276; *post*, p. 152.

(x) *Rawson v. Johnson*, 1 East, 203; *Waterhouse v. Skinner*, 2 B. & P. 447.

(y) *Jackson v. Allaway*, 6 M. & G. 942.

(z) *Morton v. Lamb*, 7 T. R. 125.

(a) *Hannuic v. Goldner*, 11 M. & W. 849.

(b) *Martin v. Smith*, 6 East, 554; *Poole v. Hill*, 6 M. & W. 835.

(c) See *post*, p. 140.

(d) *Platt on Leases*, II. 539; *Robinson v. Harman*, 1 Exch. 850.

(e) *Price v. Williams*, 1 M. & W. 6.

(f) *Stephens v. De Medina*, 4 Q. B. 422.

(g) *Ferry v. Williams*, 8 Taunt. 62.

(h) *Wilks v. Atkinson*, 1 Marsh. 412.

May, but there was no proof of any application to the defendant to accept the stock till several days afterwards, nor that the defendant waited till the closing of the transfer books at the Bank on that day, the verdict given for the plaintiff was set aside (*i*). Where in an action for not paying 250*l.*, the amount of a lien on 2,000 hats, which the defendant had agreed to pay to the plaintiff, it was proved, in support of the plaintiff's allegation of a tender of the hats, that the defendants were shown two closed casks, which they were told contained the hats, but the persons who had charge of them refused to allow the defendants to inspect their contents, it was held, that the allegation of a tender was not proved (*k*). Similar evidence would therefore be insufficient to show readiness and willingness. An averment of readiness and willingness to grant a lease, is equivalent to an averment of having title to grant one; and a traverse of this averment puts in issue the plaintiff's ability to perform the contract, for the words "ready and willing" imply not only the disposition but the capacity to do the act (*l*).

Where it is agreed that some act shall be performed by each of two parties at the same time, he who was ready and offered to perform his part, but was discharged (or prevented (*m*)) by the other, may maintain an action against the other for not performing his part of the agreement (*n*). "The party must show he was ready, but if the other stops him on the ground of an intention not to perform his part, it is not necessary for the first to go further and do a nugatory act" (*o*).

The above rule is subject to this limitation, that the person who is ready and willing, and tenders to perform his part of the agreement, must have the *immediate* power of performing it, and if the act which the plaintiff is discharged or prevented from doing would, if done, amount to an *endeavour* only to perform his part of the agreement, such discharge is insufficient to give a right of action. This was decided by *Smith v. Wilson* (*p*). In that case, which was an action of covenant on a charter-party, it was held that the performance of the voyage (from Great Britain to Monte Video and back) was a condition precedent to the recovery of the freight. The vessel, before her arrival at M. V., was, without any default on the part of her owner, the plaintiff, seized and brought back to London, but ultimately she was restored to the plaintiff, who then tendered the ship to the defendant for the performance of the stipulated voyage, requesting instructions from the de-

(*i*) *Bordenave v. Gregory*, 5 East, 106. See *Merrit v. Lane*, Str. 458.

(*k*) *Isherwood v. Whitmore*, 11 M. & W. 347; and see on the subject of readiness and willingness, tender, &c., *Startup v. McDonald*, 6 M. & G. 593.

(*l*) *De Medina v. Norman*, 9 M. & W. 820.

(*m*) *Per Dallas, C. J.*, in *Ferry v. Williams*, 8 Taunt. 70; *per Lord Abinger, C. J.*, in *Fell v. Knight*, 8 M. & W. 276.

(*n*) *Laird v. Pim*, 7 M. & W. 474.

(*o*) *Per Lord Mansfield, C. J.*, in *Jones v. Barkley*, Doug. 684; and see *Jackson v. Jacob*, 3 B. N. C. 869.

(*p*) 8 East, 437.

fendant, offering to observe the same, &c., but the defendant refused to give such instructions, and discharged the plaintiff from prosecuting or completing the voyage. Lord *Ellenborough*, C. J., in delivering the judgment of the court, said,—“Where a man by doing a previous act would acquire a right to a debt or duty; by a tender to do the previous act (*q*), if the other party refuse to permit him to do it, he acquires the right as completely as if it had actually been done, but the question still occurs, whether by actually doing the previous act tendered to be done in this case, the plaintiff *would have* acquired a right to the freight and other payments demanded. Here, if he had done all that he had offered to do, and which the defendant discharged him from performing, still it would have amounted, at most, only to an *endeavour* on his part to prosecute and complete the voyage, which might still be frustrated by the act of God, dangers of the seas, &c.,”—and after referring to the case of *Jones v. Barkley* (*r*), the Lord Chief Justice said,—“The difference between the two cases is this: in the one” (*Jones v. Barkley*), “by doing an act in the power of the party to have done, he would have acquired a full and instant right to the duty demanded; in the other, by doing the act tendered to the full extent, to which the party tendering was able to perform it, he would still have only taken certain steps of remote and uncertain effect towards the attainment of the object and completion of the event necessary to be attained and completed in order to vest a right to the duty demanded in the party demanding it.”

Independent Promises.—Where the mere promise, and not the performance thereof, is the consideration of the agreement, there an action may be maintained by either party, without averring performance of the agreement on his part (*s*). As where the plaintiff agreed to sell land to the defendant, which the defendant agreed to pay for within four years, with interest on the purchase-money in the interval, but no time was fixed for the completion of the purchase, it was held, that the plaintiff might maintain an action within the four years for arrears of the interest, without showing a performance of the agreement on his part, by a conveyance or a readiness to convey the land. *Parke*, B., said, “The consideration for the defendant’s paying the interest is the plaintiff’s *undertaking* to sell the land, not the actual sale of it” (*t*). “Whether one promise be the consideration of another, or whether the performance, and not the mere promise, be the consideration, must be gathered from, and depends entirely upon, the words and nature of the agreement;” *per Lawrence*, J. (*u*).

Having thus illustrated the nature of conditions precedent, con-

(*q*) Readiness and willingness to perform is sufficient in most cases, as has been observed above, but that is obviously best evidenced by an actual offer or tender to perform.

(*r*) Dougl. 684.

(*s*) Hob. 106.

(*t*) *Wilks v. Smith*, 10 M. & W. 355.

(*u*) *Glazebrook v. Woodrow*, 8 T. R.

current acts and independent promises, it remains only to add, that there are not any technical words by which any of these considerations are constituted. The principal difficulty in the construction of agreements consists in discovering whether the consideration be a condition precedent, a concurrent act, or an independent promise. This, however, must be collected from the apparent intention of the parties to the agreement. The intention of the parties is, or is assumed to be, the governing principle of all the decisions (*x*). When the nature of the consideration is ascertained, the rules before laid down before invariably hold. See further on this subject, 1 Wms. Saund. 320, n. 4; ii. 352, n. 3; Willes, 157, *in notis*, and *post*, tit. "Covenant."

IV. *Of the Plea.*

1. *In Abatement*, p. 142.
2. *Of the General Issue, and the Pleading Rules*, p. 143.
3. *Accord and Satisfaction*, p. 147.
4. *Infancy*, p. 152.
5. *Payment*, p. 160.
6. *Payment into Court*, p. 165.
7. *Release*, p. 166.
8. *Statutes of Limitations*, p. 168.
9. *Set-off*, p. 181.
10. *Tender*, p. 186.

1. *In Abatement.*

1. *In Abatement*.—By 3 & 4 Will. IV. c. 42, s. 8, "no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed in any court of common law, unless it shall be stated in such plea, that such person is resident within the jurisdiction of the court, and unless the place of residence (*y*) of such person shall be stated with convenient certainty in an affidavit verifying such plea." This plea cannot be pleaded, if one of the defendants not sued be out of the jurisdiction, though others be within it (*z*).

A plea in abatement of the coverture of the defendant is not a plea of nonjoinder within the meaning of the foregoing section, which applies only to the case of co-contractors (*a*), but it is a dilatory plea, requiring an affidavit of verification under the 4 Anne, c. 16, s. 11 (*b*). It is an issuable plea (*c*), and must be

(*x*) *Per* Sir J. Mansfield, in *Smith v. Woodhouse*, 2 N. R. 240; *per* Tindal, C. J., in *Stavers v. Curling*, 3 B. N. C. 355.

(*y*) *Mayburie v. Mudie*, 5 C. B. 283.

(*z*) *Joll v. Lord Curzon*, 4 C. B. 249.

(*a*) *Jones v. Smith*, 3 M. & W. 526.

(*b*) *Lovell v. Walker*, 9 M. & W. 299.

(*c*) *Burch v. Leake*, 8 Sc. N. R. 66.

pleaded in person (*d*). The 9th, 10th, and 11th sections of the 3 & 4 Will. IV. c. 42, lay further restrictions on pleas in abatement; but subject to these, parties are still entitled to the benefit of such pleas (*e*).

Before the Common Law Procedure Act, 1852, when a defendant pleaded in abatement the nonjoinder of a co-defendant, the plaintiff, if he could not answer the plea, was obliged to commence a fresh action, unless the court set aside the plea, or allowed the writ to be amended for the purpose of saving the Statute of Limitations. The Court of Queen's Bench did not consider this a sufficient ground for so doing (*f*); the Court of Exchequer did (*g*); and the Court of Common Pleas, differing from both, held that the question ought to be decided without reference to the Statute of Limitations at all (*h*). The 15 & 16 Vict. c. 76, s. 38, however, enacts, that—"In any action of *contract* where the nonjoinder of any person or persons as a co-defendant or co-defendants has been pleaded in abatement, the plaintiff shall be at liberty, *without any order*, to amend the writ of summons and the declaration by adding the name or names of the person or persons named in such plea in abatement as joint contractors, and to serve the amended writ upon the person or persons so named in such plea in abatement, and to proceed against the original defendant or defendants, and the person or persons so named in such plea in abatement. Provided that the date of such amendment shall, *as between the person or persons so named in such plea in abatement and the plaintiff*, be considered for all purposes as the commencement of the action."—The effect of this section is to render the Statute of Limitations available to the added defendant, but not to the defendant originally sued, who cannot therefore now obtain any advantage in this respect by such a plea; and to relieve the plaintiff from the necessity of any application to the court, as in the cases above cited.

2. Of the General Issue, and the Pleading Rules.

2. *General Issue*.—The general issue in this action is non assumpsit, except to the *indebitatus* counts, when it is "never indebted." "That the defendant did not warrant," "did not agree," or any other appropriate denial, would be unobjectionable. 15 & 16 Vict. c. 76, sched. B. If by mistake not guilty be pleaded, instead of non assumpsit, such plea will not, it seems, be bad (*i*).

(*d*) 2 Wms. Saund. 209, a.

(*e*) See *Esdaile v. Trustwell*, 2 Exch. 312.

(*f*) *Roberts v. Bate*, 6 A. & E. 778.

(*g*) *Goodchild v. Leadham*, 1 Exch.

706.

(*h*) *Phillips v. Lewis*, 1 L. M. & P. 156.

(*i*) *Marsham v. Gibbs*, 2 Str. 1022.

By the 6th Pl. R. Hil. T. 1853 (j):—"In all actions on simple contract, except on bills of exchange and promissory notes, the plea of non assumpsit, or a plea traversing the contract or agreement alleged in the declaration, shall operate only as a denial in fact of the express contract, promise, or agreement alleged, or of the matters of fact from which the contract, promise, or agreement alleged may be implied by law. *E. g.* In an action on a warranty, such pleas will operate as a denial of the fact of the sale and warranty having been given, but not of the breach; and, in an action on a policy of insurance, of the subscription to the alleged policy by the defendant, but not of the interest, of the commencement of the risk, of the loss, or of the alleged compliance with warranties. In actions against carriers and other bailees, for not delivering or not keeping goods safe, or not returning them on request, and in actions against agents for not accounting, such pleas will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach. To causes of action to which the plea of 'never was indebted' is applicable as provided in schedule B. (36) of the Common Law Procedure Act, 1852, and to those of a like nature,"—*i. e.* the general *indebitatus* counts,—“the plea of non assumpsit shall be inadmissible, and the plea of 'never was indebted' will operate as a denial of those matters of fact from which the liability of the defendant arises; *e. g.* in actions for goods bargained and sold, or sold and delivered, the plea will operate as a denial of the bargain and sale, or sale and delivery in point of fact; in the like action for money had and received, it will operate as a denial both of the receipt of money, and the existence of those facts which make such receipt by the defendant a receipt to the use of the plaintiff.”

“In all actions upon bills of exchange and promissory notes, the plea of non assumpsit and 'never indebted' shall be inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *e. g.* the drawing, or making, or indorsing, or accepting, or presenting, or notice of dishonour of the bill or note.” R. 7. This rule is confined to cases where the action is *only* on the note, and on the promise to pay contained in or implied by law from it. Thus, where an action is brought by an executor on a bill or note payable to his testator, with an express promise to him, non assumpsit may be pleaded (k). The rule is to be read as if it were worded thus:—"In all actions on bills of exchange and promissory notes *simpliciter*, without any other matter, &c." *Per Parke, B., S. C.* See *post*, tit. "Bills of Exchange," "Pleading."

“In every species of actions on contract, all matters in confession and avoidance, including not only those by way of discharge, but

(j) These rules, with regard to actions on simple contract, are substantially the same as the Pleading Rules of Hil. T.

4 Will. IV.

(k) *Timmis v. Platt*, 2 M. & W. 721.

those which show the transaction to be either void or voidable in point of law, on the ground of fraud or otherwise, shall be specially pleaded; *e. g.* infancy, coverture, release, payment, performance, illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c. bills or notes by way of accommodation, set-off, mutual credit, unseaworthiness, misrepresentation, concealment, deviation, and various other defences, must be pleaded." R. 8.

A broad distinction is made in the first of these rules between actions on express and actions on implied contracts: non assumpsit in the former case putting in issue the fact only of the contract; but in the latter the matters of fact from which the contract may be implied (*l*). The plea of non assumpsit puts in issue the making of the contract *with the plaintiff*. An action on a policy is mentioned in the rules only as an example illustrating the general rule, and in such an action the plea of non assumpsit denies that the defendant ever contracted by such a policy with the plaintiff, and consequently puts in issue the fact that the plaintiff caused the policy to be made (*m*). So a contract inconsistent with the one declared on (*n*), or facts which qualify the contract stated in the declaration, and introduce a new stipulation into it (*o*), may be shown under non assumpsit; for in effect, as to the contract declared on, the defendant denies the making of *such* a promise (*p*). But if a subsequent agreement be substituted for that declared on (*q*), or an independent parol agreement be merged in a contract by deed (*r*), such substitution or merger must be pleaded specially; though it is otherwise if the previous parol agreement be inchoate merely, *e. g.* the negotiations previous to a deed (*s*).

In *Hemming v. Trenery* (*t*), which was an action on a guarantee, to which the only plea was non assumpsit, it appeared at the trial that the instrument had been interlined so as materially to alter its effect, and the jury found that the interlineation was made after the instrument was executed; it was held, that the effect of the alteration being only to discharge or modify the original contract, it was a defence which required to be shown by confession and avoidance, and could not be given in evidence under the general issue. So an alteration in a bill of exchange after acceptance cannot be given in evidence under a plea of non accept (*u*).

(*l*) *Per Tindal, C. J., in Martin v. Smith*, 4 B. N. C. 436; and *Taverner v. Little*, 5 *ibid.* 686.

(*m*) *Sutherland v. Pratt*, 11 M. & W. 314.

(*n*) *Morgan v. Pebrer*, 3 B. N. C. 457.

(*o*) *Nash v. Breeze*, 11 M. & W. 352.

(*p*) *Per Tindal, C. J., in Filmer v. Burnby*, 2 M. & G. 545.

(*q*) *Taylor v. Hilary*, 1 C., M. & R. 743.

(*r*) *Filmer v. Burnby*, 2 M. & G. 529.

(*s*) *Filmer v. Burnby*, and see *Edwards v. Bates*, 7 M. & G. 590.

(*t*) 9 A. & E. 926. See *Davidson v. Cooper*, 11 M. & W. 787.

(*u*) *Parry v. Nicholson*, 13 M. & W. 778.

Evidence of circumstances independent of the contract, the object of which is to show that the consideration for the agreement was in fact a nullity, is inadmissible under the general issue. In *Passenger v. Brookes* (x), the evidence tendered was for the purpose of showing that there was no consideration for the agreement declared on by setting up a prior agreement between the plaintiff and a third party; this is collateral, and not a denial of the consideration, but a sort of confession and avoidance (y). In an action for goods sold and delivered, the defendant under the general issue may show that they were sold on a credit not expired; for if the credit was not expired when the action was commenced, the plaintiff proves a different contract from that which he has stated in the declaration, *viz.*, to pay on request (z); or that they were worthless (a); and, in an action for work and labour, that it was done for a certain purpose, *e. g.* to prevent a chimney smoking, and that it was agreed that it should not be paid for, unless the purpose was effected, which it had not been (b). Where a person is employed to do certain work for a certain sum, and part of the work is afterwards done by the employer, the amount of the latter work is matter not of set-off but deduction, and may be given in evidence under the general issue, for it is in fact evidence *pro tanto* of a breach of contract on the part of the person employed to do the work, and of how much less than the agreed sum he is entitled to recover under a *quantum meruit* (c).

Illegality of consideration, whether at common law or by statute, must be specially pleaded (d); and, not only where the express contract on which the plaintiff sues is illegal, but also where, illegal services having been performed, no contract to pay for them can be implied (e). A defendant cannot take advantage of an illegality to avoid a contract without a special plea, although the illegality becomes apparent in the course of the plaintiff's case, and without any evidence offered by the defendant (f); although, if the illegality appear on the face of the declaration, judgment thereon will be arrested (g). In cases of contracts within the Statute of Frauds, the defendant may show under the general issue, that there was no contract in writing (h). But in an action for the price of a copyright bargained and sold, it was held, that a defence on the ground that the copyright was not assigned in writing must be

(x) 1 Scott, 560 (wrongly reported in 1 B. N. C. 587; see *per Parke*, B., 11 M. & W. 355).

(y) *Per Parke*, B., in *Bennion v. Davison*, 3 M. & W. 183. See *Bingham v. Stanley*, 2 Q. B. 117.

(z) *Broomfield v. Smith*, 1 M. & W. 542.

(a) *Cousins v. Paddon*, 2 C., M. & R. 547.

(b) *Hayselden v. Staff*, 5 A. & E. 153.

(c) *Turner v. Diaper*, 2 M. & G. 241; *Newton v. Forster*, 12 M. & W. 241.

(d) *Martin v. Smith*, 4 B. N. C. 436.

(e) *Potts v. Sparrow*, 1 B. N. C. 594.

(f) *Fenwick v. Laycock*, 1 Q. B. 414.

(g) *Daintree v. Hutchinson*, 10 M. & W. 85.

(h) *Leaf v. Tuton*, 10 M. & W. 393.

specially pleaded (*i*). By section 32 of the Medical Act (*k*), "no person shall be entitled to recover any charge in any court of law for any medical or surgical advice, attendance, or for the performance of any operation, or for any medicine which he shall have both prescribed and supplied (*l*), unless he shall prove upon the trial that he is registered under this act" (*m*). The non-delivery of a signed bill in an action on an attorney's bill is not available under the general issue (*n*). Where an act provides that the plaintiff shall not recover without giving notice of action, a want of such notice must be specially pleaded (*o*).

3. Accord and Satisfaction.

3. Accord (*p*) and Satisfaction.—Accord with satisfaction is a good plea in bar to this action (*q*), because damages only are recoverable; and accord with satisfaction to one defendant is a bar to all (*r*). This defence must be pleaded specially (*s*). An accord, to make a good plea, must be perfect, complete, and executed (*t*); for an accord executory is only substituting one cause of action for another, which might go on to any extent. Hence a plea of accord to do several things, with an averment of performance of some only, and of an offer to perform the rest, is bad (*u*). "It appears by a long train of authorities, commencing with that in Dyer, 356, that a plea of accord, to be a good plea, must show an accord which is

(*i*) *Barnett v. Glossop*, 1 B. N. C. 633; but see *Johnson v. Dodgson*, 2 M. & W. 653. In *Hemming v. Trenery*, 9 A. & E. 935, Lord Denman, C. J., in delivering the judgment of the court, observed, "That upon defences which arise as to matters of law, a difference of opinion seems to be entertained by different judges, whether such defences may be set up under the general issue, or must be specially pleaded." If there is any doubt both pleas will be allowed. *Smith v. Dixon*, 4 Dowl. 571.

(*k*) 21 & 22 Vict. c. 90.

(*l*) *i. e.*, an apothecary.

(*m*) By the 27th section a copy of the "Medical Register," printed and published under the direction of the Medical Council, is made evidence in all courts that the person whose name is therein inserted is duly registered; the omission of the name is *prima facie* evidence to the contrary, which, however, may be rectified by the production of a certified copy. See *Pedgrift v. Chevalier*, 8 C. B. (N. S.) 246. By sect. 31, every person registered under the Act is entitled to practise and to recover in any

court of law reasonable charges for advice and medicines, provided that any college of physicians may pass a bye-law that no one of their members shall be entitled to sue, which may be pleaded in bar.

(*n*) *Robinson v. Roland*, 6 Dowl. 271; but see *Eicke v. Nokes*, 1 M. & Rob. 359.

(*o*) *Davey v. Warne*, 14 M. & W. 199.

(*p*) Accord is an agreement between two or more persons when any one of them is injured to satisfy him with some recompense. *Termes de la Ley*.

(*q*) *Andrew v. Boughey*, Dyer, 75, b. See as to accord and satisfaction by a stranger, if adopted by the party liable, *per Cur.*, *Jones v. Broadhurst*, 9 C. B. 173. In *Lynn v. Bruce*, 2 H. Bl. 317, it was held that an agreement to accept a composition in satisfaction of a debt was not a sufficient consideration to support a promise by the debtor to pay the composition; a mere accord not being a sufficient consideration.

(*r*) *Peytoe's case*, 9 Rep. 79, b.

(*s*) *Paramore v. Johnson*, Lord Raym. 566.

(*t*) *Peytoe's case*, 9 Rep. 79, b.

(*u*) *Shephard v. Lewis*, T. Jones, 6.

not executory at a future day, but which ought to be executed, and has been executed, before action brought" (v). On the other hand it is laid down in Com. Dig., that—"An accord, with mutual promises to perform, is good, though the thing be not performed at the time of action, for the party has a remedy to compel the performance,"—and this was recognized by the Court of Queen's Bench, in *Cartwright v. Cooke* (x). "This was a good accord as between the parties to the instrument, and binds the plaintiff. The promise of one was a consideration for that of the other. Each had an *immediate* remedy upon it against the other, and in this respect it falls within the rule in Com. Dig. Accord, B. 4, &c." The rational distinction on this subject is, it would seem, stated by Mr. Smith in the notes to *Cumber v. Wane* (1 Lead. Ca. 150), that "if the *promise* be received in satisfaction, it is a good satisfaction; but if the *performance* is intended to operate in satisfaction, there shall be no satisfaction without performance." In such a case it is "for the jury to decide whether the plaintiff agreed to accept the *agreement* itself, not the performance of it, as a satisfaction for his debt, so that if it was not performed, his only remedy would be by an action for the breach of it, and not a right to recur to the original debt." *Per Parke, B.* (y).

Where to an action on a promissory note, the defendant pleaded an agreement between himself and the plaintiff, with other creditors, that they would accept a composition in satisfaction of their respective debts, to be paid in a reasonable time, and then averred *a tender, and refusal* on the part of the plaintiff, of the composition, the plea was held bad (z). But where a debtor being unable to meet the demands of his creditors, they signed an agreement (which was assented to by the debtor) to accept payment by his covenanting to pay a third of his annual income to a trustee of their nomination, and give a warrant of attorney as a collateral security, and the debtor was willing to perform his part, but the creditors did not appoint a trustee: it was held, that the agreement, though not properly an accord and satisfaction, was a good defence to an action by one of the creditors for his demand: inasmuch as it was "a consent by the parties signing the agreement to forbear enforcing their demands, in consideration of their own mutual engagement of forbearance; and that each creditor was bound, in consequence of the agreement of the rest" (a).

Acceptance of a negotiable security for a lesser sum may be pleaded in satisfaction of a debt of a greater amount (b). And the

(v) *Per Tindal, C. J.*, delivering judgment in *Bayley v. Homan*, 3 B. N. C. 920. See *Bradley v. Gregory*, 2 Camp. 383.

(x) 3 B. & Ad. 703.

(y) *Evans v. Powis*, 1 Exch. 607.

(z) *Heathcote v. Crookshanks*, 2 T. R.

24.

(a) *Good v. Cheesman*, 2 B. & Ad. 328. See *Blackstone v. Wilson*, 26 L. J., Exch. 229.

(b) *Sibree v. Tripp*, 15 M. & W. 23, overruling (semble) *Cumber v. Wane*, Str. 426.

negotiability or otherwise of the security would seem to make no difference, for the grounds of the decision in the above case were twofold: firstly, that the satisfaction was "by giving a *different* thing having *different* properties, and not part of the sum itself;" on which ground the acceptance of a chattel, however small its value, has always been held a good accord and satisfaction (c); and, 2ndly, that the court cannot inquire into the reasonableness of the satisfaction. It is sufficient if the parties have so agreed, and the bill or note accepted *may* be of equal value to the debt for which it is accepted. The first ground obviously applies alike to negotiable and non-negotiable securities; and, that even a non-negotiable security (though for a smaller sum than the debt for which it is accepted) *may* be more advantageous to the person accepting it than the debt itself, seems clear from two considerations, first, that in an action on the bill or note, the burthen of proof is thrown on the defendant to disprove consideration; whereas, in an action for the debt, it would lie on the plaintiff; and, secondly, that since the 18 & 19 Vict. c. 67, the remedy upon bills or notes is rendered in certain cases speedier and more certain than upon a simple contract debt. The acceptance of a smaller sum *before* the larger sum is due, is good in accord and satisfaction (d); and so of a smaller sum in settlement of a doubtful claim of a larger amount, an action being depending (e), or if the amount claimed be uncertain, as in an action on a *quantum meruit* (f).

Payment of a smaller sum cannot, it seems, be pleaded in satisfaction of a larger (g); at all events if the latter sum be fixed and ascertained (h). In *Cumber v. Wane, Pratt*, C. J., said, "It must appear to the court to be a reasonable satisfaction, or at least the contrary must not appear." In *Fitch v. Sutton* (i), the defendant produced a receipt signed by the plaintiff for a composition of 7s. in the pound for his debt, which he acknowledged to be *in full of all demands*, and it was contended that this receipt was a discharge of the debt; but Lord *Ellenborough*, C. J., said, that it could not be pretended that a receipt of part only, though expressed to be in full of all demands, must have the same operation as a release; it was impossible to contend that an acceptance of 17l. 10s. was an extinguishment of a debt of 50l. He added, that there must be some consideration for the relinquishment of the residue,—something collateral, to show a possibility of benefit to the party relinquishing his further claim, otherwise the agreement was *nudum pactum*. In *Thomas v. Heathorn* (j), *Bayley*, J., says, "It is perfectly clear, that in point of law, payment

(c) Litt. s. 344.

(d) *Pinel's case*, 5 Rep. 117.

(e) *Longridge v. Dorville*, 5 B. & Ald. 117.

(f) *Wilkinson v. Byers*, 1 A. & E. 106; *secus*, if the liability to any debt is disputed, *Edwards v. Baugh*, 11 M. &

W. 641, and no action is depending, *Smith v. Monteith*, 13 M. & W. 427.

(g) *Down v. Hatcher*, 10 A. & E. 121.

(h) *Per Parke, B., Cooper v. Parker*, 15 C. B. 822.

(i) 5 East, 230.

(j) 2 B. & C. 481.

of a smaller sum cannot be pleaded as a satisfaction for a larger." In *Down v. Hatcher*, which was an action for the use and occupation of a farm, agistment of cattle and money due on an account stated, such a plea was held bad after verdict. In *Sibree v. Tripp* (k), Parke, B., said, "It is clear that, if the claim be a liquidated and ascertained sum, payment of part cannot be satisfaction of the whole, although it may under certain circumstances be evidence of a gift of the remainder." The doctrine, however, upon which all the above cases rest, viz., that it is the province of the court to inquire into the adequacy of the satisfaction, has been much questioned in later cases (l). In *Cooper v. Parker* (m), the case of *Down v. Hatcher* was strongly commented on. To the argument of counsel, that a good cause of action for a pecuniary demand cannot be satisfied by any money payment short of the full amount, Parke, B., said, "That doctrine applies only to a certain ascertained debt. In *Down v. Hatcher*, the distinction between an ascertained and liquidated demand, and one which is unliquidated, did not attract attention. It has always seemed to me that the case was questionable on that account;" and the same learned judge, in delivering judgment, said, "Whenever the question may arise whether *Down v. Hatcher* is good law, I should have a great deal to say against it." It has been held, that a bond cannot be pleaded in satisfaction of another bond (n).

B. and C. being jointly indebted to A., A. sued B. alone, who compromised the action by a payment of a portion of the claim, and A. gave a receipt for debt and costs in the action. A. then commenced an action against C. for the balance. It was contended, that the debt was already discharged; but the court were of a different opinion, observing, that the payment was not made in discharge of A.'s right against C.; and the result of the whole was, that it did not operate as a release or matter which could have been pleaded as an accord and satisfaction, but amounted merely to an engagement not to sue B., which could only be pleaded by himself (o). If an action be brought on a *quantum meruit*, and the defendant agree to pay a less sum than the demand in full, that is a good consideration for a promise by the plaintiff to pay his own costs and proceed no further (p).

The defendant may plead that he was the payee of a promissory note, and that he indorsed it to the plaintiff "for and on account of" the debt sued for (q); for this is a sort of qualified or conditional payment (r), and operates as an absolute payment during the currency of the bill or note (s). If this were not so, the de-

(k) 15 M. & W. 23.

(l) See notes to *Cumber v. Wane*, Smith's L. C. (6th ed.)

(m) 15 C. B. 822 (Exch. Cham.)

(n) *Manhood v. Crick*, Cro. Eliz. 716.

See per Parke, J., 5 B. & Ad. 750.

(o) *Watters v. Smith*, 2 B. & Ad. 889;

acc. *Field v. Robins*, 8 A. & E. 90.

(p) *Wilkinson v. Byers*, 1 A. & E. 106.

(q) *Kearslake v. Morgan*, 5 T. R. 513.

(r) Per Pollock, C. B., *Griffiths v. Owen*, 13 M. & W. 58.

(s) *Belshaw v. Bush*, 11 C. B. 191.

fendant might be forced to pay the debt first, and the bill afterwards, and so pay the debt twice over. On the dishonour, &c., of the bill or note, the plaintiff's original demand revives (*t*); which distinguishes the case of a bill, &c., taken "on account of" a debt from one taken in satisfaction and discharge, for in the latter case the remedy is extinguished (*u*), in the former it is only suspended (*v*). In *Kearslake v. Morgan*, the security was given for the whole debt; and this seems necessary to entitle the party to plead it in bar; for where a debtor had compounded with his creditors, given them the security of a third person for payment of *part* of the stipulated dividend, it was held, that he was not discharged upon payment of that only, the residue continuing unpaid (*w*).

Although if a creditor simply agrees to accept less from his debtor than his just demand, that will not bind him (*x*); yet if, upon the faith of such an agreement, a third person be induced to become surety for any part of the debts, on the ground that the party will be thereby discharged, or if the other creditors be induced to relinquish their further demands upon the same supposition, the agreement, though not under seal, will be binding: and a creditor, after the security given has been paid, cannot sue for the residue of his demand; for that would be a fraud on the surety and the other creditors (*y*). *Note*.—It did not appear, in this case, that the plaintiff had induced any of the other creditors or the surety to sign the agreement (*z*). But where the plaintiff and other creditors of the defendants, subscribed to resolutions for entering into a composition deed with the defendants, upon their property being assigned to trustees for the payment of their creditors; the defendants and their trustees having refused to allow the plaintiff to come in as a creditor under the deed; it was held, that the plaintiff, although he had subscribed the resolutions, might, notwithstanding, sue the defendants for the amount of his demand (*a*). If the creditors sign an agreement to give the debtor time for the payment of their respective demands, and to take his promissory notes for the amount, they cannot sue for the original cause of action, without proving that the agreement has been broken on the part of the debtor (*b*); *i. e.*, provided the *performance* of the agreement was what was agreed to be taken in satisfaction, and not the *agreement* only; *per Parke, B.* (*c*). In such cases the strict performance by the debtor of the stipulations of the agreement is necessary; and, therefore, in *Crawley v. Hilary* (*d*), where the de-

(*t*) *Stedman v. Gooch*, 1 Esp. 3, *per* Lord Kenyon, C. J.

(*u*) *Sard v. Rhodes*, 1 M. & W. 153.

(*v*) *Price v. Price*, 4 D. & L. 527.

(*w*) *Walker v. Seaborne*, 1 Taunt. 526.

(*x*) *Reay v. Richardson*, 2 C., M. & R. 422.

(*y*) *Steinman v. Magnus*, 11 East, 390.

See *Bradley v. Gregory*, 2 Campb. 383.

(*z*) See *Boyd v. Hind*, 1 H. & N. 938 (Exch. Chamb.)

(*a*) *Garrard v. Woolner*, 8 Bingh. 258.

(*b*) *Boothbey v. Sowden*, 3 Campb. 175.

(*c*) *Evans v. Powis*, 1 Exch. 607.

(*d*) 2 M. & S. 122.

defendant had not *tendered* the promissory notes to the plaintiff, in accordance with the terms of the agreement, although it was proved that the plaintiff might have had them if he had applied; it was held, that the plaintiff might resort to his original demand; Lord *Ellenborough*, C. J., saying, "The rule is, that the party to be discharged is bound to do the act which is to discharge him, and not the other party." *Acc. Evans v. Powis*, where the agreement was to accept a composition of 10s. in the pound, payable *by instalments on certain days*, and a plea, which did not state that the instalments were paid, or a tender of them made at the stipulated times, although it did state a general readiness and willingness to pay the total amount of the composition, was held bad after verdict. A tender of the instalments would have been sufficient (*e*); and such a tender may be dispensed with by the defendant (*f*).

4. *Infancy.*

4. *Infancy.*—The defendant may plead that he was an infant at the time of making the promise (*g*). This privilege of avoiding contracts, which the law confers on such as enter into them during their minority, *i. e.* (by the law of England) within the age of 21 years, is a personal privilege, the benefit of which must be claimed by the infant, and which cannot be exercised for him by any other person (*h*). The plea of infancy ought not to be pleaded by attorney, but by guardian; for an infant cannot appoint an attorney (*i*). In cases where the contract declared on by the plaintiff has been made with the infant for necessities suitable to his estate and degree, the plea of infancy will not operate as a bar to the plaintiff's demand; for the law permits an infant to bind himself, either by simple contract or single bill (*j*), for necessities (*k*), (*viz.*) necessary meat, drink, apparel, physic, instruction, and the like; and an infant is capable of entering into a contract not merely for necessities for ready money, but into any reasonable contract for necessities, although he may have an income allowed to him sufficient to supply him with necessities (*l*). Hence it frequently becomes a question what are necessities.

In an action for goods sold and delivered, it appeared that the goods in question were a livery for a servant of the defendant, who

(*e*) *Bradley v. Gregory*, 2 Camp. 283.

(*f*) *Reay v. White*, 1 C. & M. 748.

(*g*) Payment of money into court will not preclude a defendant from availing himself of his infancy, because the money may have been paid into court for necessities. *Hitchcock v. Tyson*, 2 Esp. 481, n.

(*h*) *Per Eyre*, C. J., in *Keane v. Boycott*, 2 H. Bl. 515. "If an infant is the owner of houses, it is necessary to have them kept in repair, and yet the contract to repair them will not bind the infant; for

no contracts are binding on infants, except such as concern their person." *Per Haughton*, J., 2 Roll. R. 271.

(*i*) *Bird v. Pegg*, 5 B. & Ald. 428. See *Morgan v. Thorne*, 9 Dowl. 228.

(*j*) *Russell v. Lee*, 1 Lev. 86, 87. Such an instrument, which was very rare in 1808, is now obsolete. See note to *Williamson v. Watts*, 1 Campb. 553.

(*k*) 1 Inst. 172, a.

(*l*) *Burghart v. Hall*, 4 M. & W. 727.

was a captain in the army, and cockades for some of the soldiers belonging to his company. The defendant relied on his infancy, insisting that the goods in question were not within the description of necessaries. On a motion for a new trial, Lord *Kenyon*, C. J., said, that the cockades could not be considered as necessaries for the defendant, and ought not to have been included in the damages; but with respect to the livery, he could not say that it was not necessary for a person in the situation of defendant to have a servant; and if it was proper for him to have one, it was necessary that the servant should have a livery. The Chief Justice added, that, however inclined he was in general to protect infants against improvident contracts, yet he thought this case fell within the fair liability which the law imposed on infants, of being bound for necessaries, which was a relative term, according to their station in life (*m*). So in another case (*n*), the same learned judge said, that the question of necessaries was a relative fact to be governed by the fortune or circumstances of the infant, and that proof of these circumstances lay on the plaintiff. "All such articles as are purely ornamental are not necessary, and are to be rejected, because they cannot be requisite for any one, and for such matters an infant cannot therefore be made responsible. But if they are not strictly of this description; then the question arises, whether they were bought for the necessary use of the party, in order to support himself properly in the degree, state and station of life in which he moved; if they were, for such articles an infant may be responsible: and it is for the jury to decide whether the articles are of such a description or not" (*o*).

Evidence is admissible to show that the infant was already supplied with the articles in question (*p*). Dinners, confectionary, or fruit, supplied to an infant, an under-graduate in the university, having lodgings in the town, without any explanation of the circumstances under which they were supplied, have been held not to be necessaries (*q*). And so of the hire of horses, gigs, &c., to an infant under similar circumstances (*r*). Infancy is a good defence to an action on the warranty of a horse (*s*). A copyhold estate devolved on the defendant, when he was an infant of six years of age, whereupon he was admitted, and a fine duly assessed. Two years after the defendant (who had continued in possession from the time of his admission) came of age, an action was brought for the fine, and verdict for the plaintiff. A question was made for the opinion of the court, whether this action would lie against the defendant, he being a minor at the time of the fine being assessed.

(*m*) *Hands v. Slaney*, 8 T. R. 578.

(*n*) *Ford v. Fothergill*, 1 Esp. 212.

(*o*) *Per Parke, B.*, in *Peters v. Fleming*, 6 M. & W. 47, where the plaintiff recovered in an action for a watch, watch-chain, &c., the defendant being an under-graduate of Cambridge.

(*p*) *Steedman v. Rose*, C. & Marsh. 422; *post*, p. 157.

(*q*) *Brooker v. Scott*, 11 M. & W. 67; *Wharton v. Mackenzie*, 6 Q. B. 606.

(*r*) *Harrison v. Fane*, 1 M. & G. 550.

(*s*) *Howlett v. Haswell*, 4 Camp. 118.

The court were of opinion, that the action would well lie; and *Yates, J.*, said, that if assumpsit had been brought against the infant during his minority, he should have thought it maintainable; that an infant might contract for necessaries, *à fortiori*, therefore, for a fine which was due on admission, without which the infant could not have received the rents and profits (*t*). But in this case it was clear beyond doubt, for the defendant had confirmed the contract by his enjoyment of the estate two years after he came of age (*u*).

An infant widow is liable upon a contract by her, for her deceased husband's funeral expenses, as such a contract may be considered as made for her personal benefit; the ground of the decision in this case arises out of the infant's previous contract of marriage; it will not therefore follow, that an infant child, or more distant relation, would be responsible upon a contract for the burial of his parent or relative (*v*). On the same ground, *viz.*, that man and wife are "*personæ conjunctæ*," necessaries for an infant's wife are necessaries for him; but if provided in order for the marriage, he is not chargeable, though she uses them (*w*). So if an infant contract for the nursing of his lawful child, this contract is good, and shall not be avoided by infancy, no more than if he had contracted for his own aliment or erudition. *Bacon, Max. 18.*

If goods, not necessaries, are delivered to an infant, who after full age ratifies the contract by a promise to pay, he is bound (*x*); but such a ratification cannot, it seems, be made by his executor (*y*); for the simple contract of an infant, not being for necessaries, is void, and consequently, a promise by his executor to pay in consequence of forbearance is *nudum pactum*. By saying that the contract of an infant was void, the court must have meant void under the circumstances of that case, the infant having died before any ratification of it; just as *prima facie* evidence is *conclusive* evidence, if not rebutted; for it is clear that the contract of an infant is not void but *voidable* only (*z*). "A security given by an infant, which is only *voidable*, may be revived by a promise after he comes of age. In such case he is bound in equity and conscience to discharge the debt, though the law could not compel him to do so; but he may waive the privilege of infancy which the law gives him for the purpose of securing him against the impositions of designing persons; and, if he choose to waive his privilege, the subsequent promise will operate upon the pre-

(*t*) *Acc. per Tindal, C. J.*, 1 M. & G. 553.

(*u*) *Evelyn v. Chichester*, 3 Burr. 1717. In the report of this case in Bull. N. P. 154, it is stated that the defendant was admitted on coming of age. See 11 Geo. IV. & 1 Will. IV. c. 65, s. 6.

(*v*) *Per Cur.*, *Chapple v. Cooper*, 13 L.

J., Exch. 286; 13 M. & W. 252.

(*w*) *Turner v. Trisby*, 1 Str. 168.

(*x*) *Southerton v. Whitlock*, Str. 690.

(*y*) *Stone v. Wythipoll*, Cro. Eliz. 126.

(*z*) *Per Abbott, C. J.*, in *R. v. Chillesford*, 4 B. & C. 100; *Warwick v. Bruce*, 2 M. & S. 205; *Williams v. Moore*, 11 M. & W. 256.

ceding consideration" (a). But if a bond be given by an infant during his minority, for the amount of a simple contract debt, not for necessities, the giving of the specialty will so extinguish the simple contract debt as not to leave a sufficient consideration for an express promise after full age to operate upon, and consequently an action upon the original simple contract cannot be maintained (b).

By 9 Geo. IV. c. 14, s. 5 (commonly called Lord Tenterden's Act) — "No action shall be maintained, whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification after full age of any promise or simple contract made during infancy, unless such promise or ratification shall be made by some writing signed by the party to be charged therewith." The above section, it will be observed, makes a distinction between a new "promise," and a "ratification," (see *infra*). "Any written instrument signed by the party, which, in the case of adults, would have amounted to the adoption of the act of a party acting as agent, will, in the case of an infant who has attained his majority, amount to a ratification" (c). A promise or ratification made by *an agent* would not be (*semble*) sufficient (d). A written promise by an infant after he comes to full age is sufficient under the above section, although it neither contains the name of the creditor, the amount due, nor the date, and parol evidence is admissible to supply those particulars (e).

A replication in a general form, that the articles provided were necessities, without stating how, or in what manner, they were necessities, will be sufficient to bar the plea of infancy (f). It should however appear on the face of the replication, that they were necessities *for the infant* (g).

A party may, after he attains his age of twenty-one years, ratify and so make himself liable on contracts made during infancy; and this may be done on a contract arising on an account stated as well as on any other contract (h).

If the defendant takes issue on a replication that he confirmed the promise, after he came of age, it is sufficient for the plaintiff to prove the promise, and the defendant must prove infancy if he means to take advantage of it, because it will be presumed, that a person who contracts is of a proper age to contract, until the contrary be shown (i). A replication of a new promise, after the de-

(a) *Per Ashurst, J., in Cockshott v. Bennett*, 2 T. R. 766; *acc. Gibbs v. Merrill*, 3 Taunt. 312.

(b) *Capper v. Davenant*, Bull. N. P. 155. See *Baylis v. Dineley*, 3 M. & S. 476.

(c) *Per Cur. Harris v. Wall*, 1 Exch. 122. See *Mawson v. Blane*, 10 *ibid.* 208.

(d) *Hyde v. Johnson*, 2 B. N. C. 776.

(e) *Hartley v. Wharton*, 11 A. & E. 934.

(f) *Huggins v. Wiseman*, Carth. 110.

(g) *Clowes v. Brooke*, Str. 1101.

(h) *Williams v. Moor*, 11 M. & W. 256.

(i) *Borthwick v. Carruthers*, 1 T. R. 649; *Hartley v. Wharton*, 11 A. & E. 934.

fendant came of age, must be supported by evidence of an *express* promise (e); (and in writing, signed by the party to be charged therewith; 9 Geo. IV. c. 14, s. 5, *supra*); but evidence which is not sufficient to support a new promise may amount to ratification of the old one (f). Payment of part of the plaintiff's demand, though evidenced by writing, would not, it seems, be sufficient evidence of a new promise to pay the remainder, as it is to take a case out of the statute of limitations (g). The promise also must be voluntary, and not extorted from the party under the terror of an arrest, or given in ignorance of the protection the law afforded him (h).

Contracts entered into by infants for the maintenance of their trade are not binding on them. This rule has been established for the protection of infants against improvident acts, and that they may not incur losses by trading. Assumpsit for goods sold: plea infancy; replication, that the defendant bought the goods *pro necessario victu et apparatu et ad manutentionem familie suæ*; rejoinder, that the defendant kept a mercer's shop, and bought the goods in question to sell again. On demurrer, the court were of opinion, that this buying by the infant, though for the maintenance of his trade, by which he gained his living, should not bind him (i). So (j), it was ruled by *Lee*, C. J., that tobacco sent to the defendant, who had set up a shop in the country, could not be recovered for as necessaries, the defendant appearing to be an infant; for the law would not suffer him to trade, which might be his undoing. So where in an action for work and labour, to which the defendant pleaded infancy, it appeared that the plaintiff was a writing painter, and the defendant a painter and glazier, and the work done by the plaintiff was painting and gilding letters for the defendant's customers; Lord *Kenyon*, C. J., said, the law would not allow an infant to trade, therefore an action could not be maintained against him for work done in the course of it (k).

But there is no distinction between contracts by infants for the purposes of trade and other contracts, not for necessaries; they are voidable only, and may be ratified after the infants come to full age (l). Where the plaintiff declared against the defendants, being merchants, upon a bill of exchange drawn by the defendants; one of the defendants pleaded infancy. On demurrer, the plea was held good, for the infant was a trader, and the bill was drawn in the course of trade, and not for any necessaries (m). It has been

(e) *Thrupp v. Fielder*, 2 Esp. 628.

(f) *Harris v. Wall*, 1 Exch. 130.

(g) *Thrupp v. Fielder*.

(h) *Harner v. Killing*, 5 Esp. 102.

(i) *Whittingham v. Hill*, Cro. Jac. 494.

(j) *Whynwall v. Champion*, Str. 1083.

(k) *Dilk v. Keighley*, 2 Esp. 480; but see *Anon.*, Bull. N. P. 154.

(l) *Per Parke, B., Williams v. Moor*, 11 M. & W. 258; *Warwick v. Bruce* 2, M. & S. 205.

(m) *Williams v. Harrison*, Carth. 160. Before the Common Law Procedure Act, 1852, if an action was brought against partners, or joint contractors, and one of them pleaded infancy, the plaintiff was obliged to discontinue the first action,

held, that an infant cannot bind himself even for necessities by his acceptance of a bill of exchange (*n*).

If an infant is living under the roof of his parent, who provides every thing which in his judgment appears to be proper, the infant cannot bind himself to a stranger, even for such articles as might under other circumstances be deemed necessities (*o*). And in one case; where an infant during his residence at a coffee-house contracted a debt with a tailor for wearing apparel, Lord *Kenyon* expressed an opinion that it was the duty of the tradesman to inquire into the situation of the infant, and to learn from the parent whether the infant was in want of the articles ordered, or not; and unless the tradesman could show that he had made such inquiry, he was not entitled to recover (*p*).

But although it is prudent in a tradesman to make such an inquiry, he is not bound to make it by any inflexible rule of law, nor is it a condition precedent to his right to recover (*q*), and the party who orders the goods may give such an appearance to things as to render inquiry unnecessary (*r*). Thus, where an infant drove to the plaintiff's shop accompanied by her mother, who waited in the carriage while the daughter purchased some goods, some of which she took home in the carriage, and others were delivered at the hotel where the mother and daughter resided; it was held, that the jury might fairly infer that the whole had come under the mother's inspection, and that it was not necessary that the shopman should ask the mother whether she sanctioned by her words what she sanctioned by her conduct (*s*). In an action for goods sold to an infant, the issue being necessities, if any part of the articles proved to have been furnished to the defendant may fall within the description of necessities, the evidence ought to be left to the jury (*t*).

Infancy is a good bar to an action for money lent, although the infant has expended the money in the purchase of necessities. In debt upon a single bill, the defendant pleaded his infancy; plaintiff replied, that it was for necessities, *viz.*, partly for clothes and partly for money lent for necessary support at the university. Rejoinder, that the money was lent to the defendant to spend at pleasure. Issue thereon, and judgment for plaintiff, which was

and proceed *de novo* against the others. *Jaffray v. Fairbairn*, 5 Esp. 47. See notes to *Salmon v. Smith*, 1 Wms. Saund. 206. Under the 37th section of that act, however, such a misjoinder is amendable at or before the trial; *Greaves v. Humphreys*, 4 E. & B. 851; not afterwards, *Robson v. Doyle*, 3 *ibid.* 396.

(*n*) *Williamson v. Watts*, 1 Campb. 552.

(*o*) *Bainbridge v. Pickering*, 2 Bl. R. 1325; *per Bayley, J., Borriusale v.*

Greville, Somerset Sum. Ass. 1810, MS.; *Deale v. Leave*, C. B. London Sittings after H. T. 51 Geo. III. Sir *J. Mansfield*, C. J., S. P., MS.; *ante*, p. 153.

(*p*) *Ford v. Fothergill*, Peake's N. P. C. 229; 1 Esp. 211, S. C.

(*q*) *Brayshaw v. Eaton*, 5 B. N. C. 231.

(*r*) *Per Tindal, C. J.*, in *Dalton v. Gib*, 5 B. N. C. 199.

(*s*) *Dalton v. Gib*, 5 B. N. C. 199.

(*t*) *Maddox v. Miller*, 1 M. & S. 738.

reversed on error, *Parker*, C. J., saying, that an infant might buy necessities, but he could not borrow money to buy, for he might misapply the money, and therefore the law would not trust him but at the peril of the lender, who must lay it out for him, or see it laid out, and then it was his providing and his laying out so much money in necessities for him (u). So (v), where a question was made, whether, in the case of money lent to an infant, who employs it in paying for necessities, the infant was liable, *Holt*, C. J., was of opinion that he was not; for it was upon the lending that the contract must arise, and after that time there could not be any contract raised to bind the infant, because after that he might waste the money; and the infant's applying it afterwards for necessities would not by matter *ex post facto* entitle the plaintiff to an action; for, as was observed by the court in *Earle v. Peale* (w), "the law knows of no contracts except such as are good or bad at the time of the contract made, and not to be one or other according to a subsequent contingency. So (x), where, to an action for money lent, the defence was infancy; *Buller*, J., would not permit the plaintiff to give in evidence, that the money lent was laid out in the purchase of necessities."

But it is otherwise in equity; for if one lends money to an infant to pay a debt for necessities, and in consequence thereof the infant does pay the debt, in equity the infant is liable, for there the lender of the money stands in the place of the person paid, *viz.* the creditor for necessities, and shall recover in equity as the other should have done at law (y). The same rule of equity holds with respect to money lent to a feme covert, and afterwards applied to her use for necessities. See *post*, tit. "Baron and Feme," s. 4.

If the action against an infant be grounded on a contract, the plaintiff cannot convert it into a tort, so as to charge the infant. "If one deliver goods to an infant, on a contract, knowing him to be an infant, the infant shall not be charged for them in trover and conversion" (z); for the law will not permit a plaintiff, by changing the form of action, to vary the liability of the infant. Hence, whatever be the form of the action which is commenced, if the act done by the infant is substantially founded on a contract, the plea of infancy will be a good bar: as where an infant hired a mare of the plaintiff to go a journey, in the course of which the mare was strained; the plaintiff having declared against the infant for this injury in tort, he pleaded infancy, which on demurrer was held a good plea; and Lord *Kenyon*, C. J., said, that "if it were in the power of a plaintiff to convert that which arises out of a

(u) *Earle v. Peale*, Salk. 386.

(v) *Darby v. Boucher*, Salk. 279.

(w) 10 Mod. 67.

(x) *Probart v. Knouth*, 2 Esp. 472, n.

(y) *Per Cur.*, *Marlow v. Pitfield*, 1 P. Wms. 558.

(z) *Manby v. Scott*, 1 Sid. 129; *acc. Green v. Greenbank*, 2 Marsh. 485.

contract into a tort, there would be an end of that protection which the law affords to infants. Lord *Mansfield*, indeed, frequently said, that this protection was to be used as a shield, and not as a sword; therefore, if an infant commit an assault or utter slander, God forbid that he should not be answerable for it in a court of justice. But where an infant has made an improvident contract with a person, who has been wicked enough to contract with him, such person cannot resort to a court of law to enforce such contract; and the words 'wrongfully, injuriously, and maliciously,' introduced into the declaration, cannot vary the case." But, where an infant upon hiring a horse was expressly told that it was not to be used for jumping, and he, notwithstanding, lent the horse to a friend who, in endeavouring to make it jump a fence staked it, the court held that it was an actionable offence for which the infant was liable, independently of the question whether the hiring was a contract for necessaries (z).

As in the cases of contract where the law has protected the infant against his liability, he cannot be prejudiced by the form of action in which he is sued; so in the cases *ex delicto*, where he is responsible (a), he cannot derive any advantage from it. In *Bristow v. Eastman* (b), Lord *Kenyon*, C. J., was of opinion, that money had and received would lie against the defendant, to recover money which he had embezzled, notwithstanding the infancy of the defendant, on the ground that infants were liable to actions *ex delicto*, though not *ex contractu*; and though the action for money had and received was in form an action *ex contractu*, yet in this case it was in substance an action *ex delicto*; that if trover had been brought for the property embezzled, infancy would not have been a defence; and as the object of the action for money had and received was the same, he thought the same rule of law ought to apply, and therefore that infancy ought not to be a bar.

A single bill given by an infant for the amount of necessaries is binding on him (c), and so is a bond without a penalty, but a bond in double the amount is not (d). So an account stated of monies due for necessaries will not lie against an infant, the law not giving an infant credit for accurate computation, nor can he agree to any such account (e). But an account stated by an infant not being absolutely void, but voidable only, may be ratified by him on attaining his full age; and, if so ratified, an action may be maintained thereon (f). A warrant of attorney given by an infant is absolutely void, and the court will not confirm it, though the

(z) *Burnard, app. v. Haggis*, 14 C. B. (N. S.) 45; 32 L. J. 189, C. P.

(a) In detinue, for instance, *Mills v. Graham*, 1 N. R. 140.

(b) 1 Esp. 172.

(c) *Russell v. Lee*, 1 Lev. 86, 87.

(d) *Ayliff v. Archdale*, Cro. Eliz. 920. See also 1 Inst. 172, u.

(e) *Trueman v. Hurst*, 1 T. R. 40. See *Ingledew v. Douglas*, 2 Stark. 36.

(f) *Williams v. Moor*, 11 M. & W. 256.

infant appear to have given it (knowing that it was not valid) for the purpose of collusion; for such acts of an infant as are only voidable are allowed in equity to be confirmed, but not such as are actually void (*g*). An infant cannot be bound by a submission to arbitration (*h*).

5. *Payment.*

5. *Payment.*—To an action of simple contract, the defendant may plead matter of discharge *ex post facto*, as payment before action brought. This defence must be specially pleaded; Pl. R. 8 of Hil. T. 1853; and a form is given in schedule B. to the 15 & 16 Vict. c. 76, *viz.*, “That before action he” (the defendant) “satisfied and discharged the plaintiff’s claim by payment.” By R. 14,—“payment shall not, in any case, be allowed to be given in evidence in reduction of damages or debt, but shall be pleaded in bar.”—Thus, where to an action on a bill of exchange, the defendant paid into court a sum sufficient to cover the amount of the bill and interest, *except for one year*, it was held, that evidence to show that the bill had been paid some time previously, so that the one year’s interest had never in fact accrued (under which circumstances the sum paid into court would have covered the whole amount due), was inadmissible, there being no plea of payment (*i*).

By R. 13,—“In any case in which the plaintiff (in order to avoid the expense of the plea of payment or set-off) shall have given credit in the particulars of his demand for any sum or sums of money therein admitted to have been paid to the plaintiff, or which the plaintiff admits the defendant is entitled to set off, it shall not be necessary for the defendant to plead the payment of such sum or sums of money. But this rule is not to apply to cases where the plaintiff, after stating the amount of his demand, states that he seeks to recover a certain balance without giving credit for any particular sum or sums (*k*), or to cases of set-off, where the plaintiff does not state the particulars of such set-off.”

Where a plaintiff credits a sum in his particulars of demand generally, *e. g.*, “Cr. by bills 1,500*l*.” he admits the sum to have been paid *by the defendant* (*l*). Where the plaintiff’s claim included a sum of 84*l*., the price of a chattel which had been returned by the defendant, it was held, that he might credit that sum in his particulars, as money *paid* by the defendant (*m*). Where a bill of exchange was credited in the particulars of demand as having been indorsed by the defendant to the plaintiff, but the amount of the bill was also *debited* to the defendant in

(*g*) *Saunderson v. Marr*, 1 H. Bl. 75.

(*h*) *Anon.*, B. R. Hil. 55 Geo. III.

(*i*) *Adams v. Palk*, 3 Q. B. 2.

(*k*) See *Morris v. Jones*, 1 Q. B. 397.

(*l*) *Smethurst v. Taylor*, 12 M. & W. 545.

(*m*) *Lamb v. Micklethwaite*, 1 Q. B. 400.

the particulars as having been dishonoured, it was held, that the two items destroyed each other, and that the case was the same as if the bill had not been mentioned in the particulars at all; and that in such a case payment must be pleaded to admit evidence that the bill had in fact operated as payment on account of the laches of the plaintiff (*n*).

Where a plaintiff gives credit in his particulars of demand for payments, whether made before action brought, *or after*, and goes only for the balance, a plea of payment is to be taken as pleaded to such balance; and if the defendant proves payments to that amount, independently of the sums credited in the particulars, he is entitled to a verdict (*o*). And it is the same whether the payment be credited in the particulars of demand, or be admitted on the record. Thus where in an action for 10*l.* 18*s.*, the balance of a debt of 100*l.*, the plaintiff averred, that, although 89*l.* 2*s.* had been paid, yet that he had not been paid the sum of 10*l.* 18*s.*, and the defendant pleaded *nunquam indebitatus*, it was held, that the plea was pleaded to the balance claimed, and therefore that the plaintiff, in order to recover, must prove a debt exceeding the sum of 89*l.* 2*s.* (*p*).

Where, however, the plaintiff does not give credit in his particulars of demand for any specific sum received on account, but merely states that the "action is brought to recover £—, being the balance of the following account, &c.," a plea of payment or set-off is to be taken as pleaded to the whole claim, and it is a question for the jury whether the balance claimed be *inclusive* or *exclusive* of the amount proved to have been paid or set off (*q*). Where payments are admitted in the plaintiff's particulars, he can recover only for the amount by which the claims proved by his witnesses exceed such payments (*r*).

Where a defendant pleads payment of a sum, he may, upon affidavit by the plaintiff that he cannot safely go to trial without the particulars of the payment, be compelled to furnish them (*s*).

A person who is indebted to another on several accounts, may, *at the time of payment*, apply the money to whichever account he thinks proper; and his election so to do may be either expressed or may be inferred from the circumstances of the transaction (*t*); but if the party paying does not make such election, the receiver may apply it as he pleases (*u*). The defendant owed money on two bonds, and paid money on account, but gave no directions to

(*n*) *Green v. Smythies*, 1 Q. B. 796.

(*o*) *Eastwick v. Harman*, 6 M. & W.

13.

(*p*) *Price v. Rees*, 11 M. & W. 577.

(*q*) *Townson v. Jackson*, 13 M. & W.

374.

(*r*) *Rowland v. Blaksley*, 1 Q. B. 403.

(*s*) *Ireland v. Thompson*, 4 B. N. C.

716.

(*t*) *Peters v. Anderson*, 5 Taunt. 596; *Shaw v. Picton*, 4 B. & C. 715.

(*u*) *Bowes v. Lucas*, B. R. M. 11 Geo. II. Andr. 55. See 2 Vern. 607, *per* Lord Cowper, Ch.; *Peters v. Anderson*, 5 Taunt. 596.

which he would have it applied; and upon a case reserved, it was determined, that the plaintiff had the election (*x*). The better opinion seems to be, that the application may be made by the receiver at *any time* (*y*). A creditor receiving money, without any specific appropriation by the debtor, will be permitted in a court of law to ascribe the receipt to the discharge of a prior and purely equitable debt, and sue him at law for a subsequent legal debt (*z*). But where one demand arises out of a lawful contract, and another out of an unlawful contract, the law will appropriate a payment not specifically appropriated to the lawful contract (*a*). A party, however, to whom two sums are due, the one for spirituous liquors supplied in quantities not amounting to 20s. at a time, the other for meat, &c., may apply payments, made generally, to the account for spirituous liquors (*b*).

"It seems most consistent with reason, that where payments are made upon one entire account, such payments should be considered in discharge of the earlier items." *Per Bailey, J.* (*c*). Although, however, "the payment of money on account generally, without making a specific appropriation, would, in many cases, go to discharge the first part of an account, yet that rule cannot be taken to be conclusive; it is *evidence* of an appropriation merely, and other evidence may be adduced which may vary the application of the rule (*d*). "In the case of a banking account, there is no room for any other appropriation than that which arises from the order in which the receipts and payments take place, and are carried into account. Presumably it is the first sum paid in, that is drawn out. It is the first item on the debit side of the account, which is discharged by the first item on the credit side. The appropriation is made by the very act of setting the two items against each other" (*e*). *Per Sir W. Grant, M. R.* (*f*).

There can be no appropriation of money by the receiver, where the debtor has not had the means or opportunity of exercising any election as to its application; as where money was paid to an attorney, without the knowledge of his client, for damages recovered in an action conducted by him for such client (*g*).

(*x*) *Bloss v. Cutting*, cited in 2 Str. 1194.

(*y*) *Mills v. Fowkes*, 5 B. N. C. 455. See *Devaynes v. Noble*, 1 Meriv. 606.

(*z*) *Bosanquet v. Wray*, 6 Taunt. 597. See *Arnold v. Mayor of Poole*, 4 M. & G. 897; *Biggs v. Dwight*, 1 M. & Ry. 308; *s. v.*, *per Bayley, J.*, *Goddard v. Hodges*, 1 C. & M. 36; *Lamprell v. Billericay Union*, 3 Exch. 283.

(*a*) *Wright v. Laing*, 3 B. & C. 165.

(*b*) *Cruickshanks v. Rose*, 1 M. & Rob. 100; *Philpott v. Jones*, 2 A. & E. 41.

(*c*) *Bodenham v. Purchas*, 2 B. & Ald. 45.

(*d*) *Per Cur.*, *Wilson v. Hirst*, 4 B. &

Ad. 767; *acc. per Tindal, C. J.*, *Field v. Carr*, 5 Bingh. 16; *per Alderson, B.*, *Bell v. Backley*, 11 Exch. 636; *Taylor v. Kymer*, 3 B. & Ad. 333.

(*e*) As in the ordinary case of a banker's pass book; *secus*, of entries made by bankers or others in books kept for their own private purposes, and before any communication made to the other party. *Simpson v. Ingham*, 2 B. & C. 65.

(*f*) *Clayton's case*, 1 Mer. 572. See further on this subject, *Toulmin v. Copland*, 2 Cl. & Fin. 681; *Williams v. Griffith*, 5 M. & W. 300.

(*g*) *Waller v. Lacy*, 1 M. & G. 70.

Security having been given by a surety for goods to be subsequently supplied to his principal, and not in respect of a debt which then existed, goods were accordingly supplied, and payments were from time to time made by the principal: these payments corresponded exactly with the amounts of goods supplied since the security was given, and on those payments made before the usual trade credit had expired, discount had been allowed; it was held, that these facts created a strong inference that the payments were intended in liquidation of the latter account, and therefore that the surety was relieved (*h*).

The mere production of a bill of exchange from the custody of the acceptor is not presumptive evidence of payment, unless it be shown that the bill was once in circulation after being accepted. Nor is payment to be presumed from a receipt indorsed on the bill, unless it be shown that the receipt is in the handwriting of a person entitled to demand payment (*i*). Where, the defendant being indebted to the plaintiffs for goods sold, and C. being indebted to the defendant, the plaintiffs, with consent of the defendant, drew a bill on C. payable at two months, which C. accepted, but afterwards dishonoured; it was held, that the defendant was not entitled to notice of the dishonour, his name not being on the bill, and that the bill was not to be esteemed a complete payment of the debt, under 3 & 4 Anne, c. 9, s. 7 (*k*). In this case the person insisting on the want of presentment was *not* a party to the bill.

In an action for the price of goods, it appeared that the goods were sold in the morning of Saturday, the 10th December, 1825, at York, and on the same day, at three o'clock in the afternoon, the vendee delivered to the vendor, in payment of the price, promissory notes of the bank of D. & Co. at Huddersfield, payable to bearer on demand. D. & Co. had stopped payment on the same day at eleven o'clock in the morning, and never afterwards resumed their payments; but neither of the parties knew of the stoppage, or of the insolvency of D. & Co. The vendor never circulated the notes, or presented them to the bankers for payment; but on Saturday, the 17th December, he required the vendee to take back the notes, and to pay him the amount, which the vendee refused. It was held, that the vendor was guilty of laches in not giving notice to the vendee of the non-payment of the notes and insolvency of the bankers within a reasonable time; and consequently that the notes operated as a satisfaction of the debt (*l*). "The rule as to all negotiable instruments is, that if they are taken in payment of

(*h*) *Marryatts v. White*, 2 Stark. 101.

"A surety can have no control over the way in which the principal shall make his payments, unless by distinct agreement." *Williams v. Rawlinson*, 3 Bingh. 71; and see *Pease v. Hirst*, 10 B. & C.

122.

(*i*) *Pfiel v. Vanbatenberg*, 2 Camp. 439.

(*k*) *Swinyard v. Bowes*, 5 M. & S. 62.

(*l*) *Camidge v. Allenby*, 6 B. & C. 373.

See *Rogers v. Langford*, 1 C. & M. 637.

a pre-existing debt, they operate as a discharge of that debt, unless the party who holds the instruments does all that the law requires to be done in order to obtain payment of them" (m). "It is perfectly clear, that a bill of exchange will operate as a satisfaction of a precedent debt, if the holder makes it his own by laches, as by not presenting it for payment when due" (n). So where the vendor of goods, having been paid for them by a bill drawn by the vendee on a third person, after the bill had been accepted, altered it in a material part, viz. the time of payment; it was held, that the vendor thereby made the bill his own as against the vendee, and caused it to operate as a satisfaction of the debt for which it was originally given (o). An order on a banker to give credit on a future day is not payment until the day arrives (p).

Where the holder of a bill of exchange, upon its being dishonoured, received part payment, and for the residue another bill of exchange drawn and accepted by persons not parties to the original bill, and afterwards sued the drawer and acceptor upon the original bill: it was held, that it was sufficient for him to prove presentment of the substituted bill to the acceptor for payment, and that it was dishonoured, without proving that he gave notice of the dishonour to the drawer of substituted bill (q).

"If a creditor refer a third person to his debtor for payment, intending the third person to take payment in money, and the third person, instead of taking payment in money, takes payment in any other way, he does it at his peril" (r). Although a creditor has a right to insist on payment to himself or his appointee, yet having once given an order for the payment of his debt to a third person, he has no right to revoke that order, provided there be a pledge by the person to whom the authority is given that he will pay the debt according to the authority (s).

Where to a declaration on a guarantee by the defendant for the payment of goods to be supplied to S., with an averment that plaintiff supplied S. with goods to the amount of 78*l.*, that S. did not pay, nor did defendant, after notice, it was pleaded, that S. did pay the sum in the declaration mentioned, in full satisfaction and discharge, &c., and that plaintiff received the same: and plaintiff replied, that S. did not pay, nor did plaintiff receive the said sum in the declaration mentioned, in full satisfaction and discharge; it

(m) *Per Bayley, J.*, in *Camidge v. Allenby*, 6 B. & C. 382. See *Plimley v. Westley*, 2 B. N. C. 249.

(n) *Per Lord Tenterden, C. J.*, 3 B. & Ad. 663.

(o) *Alderson v. Langdale*, 3 B. & Ad. 660. *Secus*, if the vendor draws, and the vendee accepts, a bill of exchange in payment for goods, which bill is subsequently altered by the drawer in a material part. *Atkinson v. Hawdon*, 2 A. & E. 628.

(p) *Pedder v. Watt*, B. R. H. 36 Geo. III., L. P. B. 98, *Dampier, MSS.*, L. I. L.

(q) *Bishop v. Rowe*, 3 M. & S. 362.

(r) *Per Bayley, J.*, in *Smith v. Ferrand*, 7 B. & C. 24. See *Baillie v. Moore*, 8 Q. B. 489.

(s) *Hodgson v. Anderson*, 3 B. & C. 842: and see *Crowfoot v. Gurney*, 9 Bingh. 372; *Hamilton v. Spottiswoode*, 4 Exch. 200.

was held, that the pleadings did not confine the plaintiff in his proof to the 78*l.*; but that after proof by defendant, that S. had paid 78*l.*, plaintiff might, without having new assigned, give evidence of a balance unpaid beyond the 78*l.* (t).

When the defendant pleads that he paid, and the plaintiff accepted monies in full satisfaction, a replication alleging that the plaintiff did not accept the monies in full satisfaction, (or, a joinder of issue under s. 79 of the Comm. Law Proc. Act, 1852,) puts the payment as well as the acceptance in issue (u).

6. *Payment into Court.*

6. *Payment into Court.*—By 15 & 16 Vict. c. 76, s. 70, “It shall be lawful for the defendant in all personal actions, (except actions for assault and battery (x), false imprisonment, libel, slander, malicious arrest or prosecution, criminal conversation (y), or debauching of the plaintiff’s daughter or servant,) and, by leave of the court or judge, upon such terms as they or he may think fit, for one or more of several defendants, to pay into court a sum of money by way of compensation or amends.”

The above section applies only “where the money is paid *in satisfaction* of the cause of action” (z). It cannot therefore be pleaded to an action on a bond, alleging breaches, under the 8 & 9 Will. III. c. 11 (a). The whole penalty, however, may be paid into court (b). If the defendant usurps the privilege of paying money into court, when not entitled to do so, the plaintiff’s remedy is by an application to the court or a judge (c).

By s. 71, “When money is paid into court, such payment shall be pleaded in all cases, and, as near as may be, in the following form, *mutatis mutandis*:—‘The defendant, by —— his attorney, [or, in person, &c.] [*if pleaded to part, say, ‘as to £——, parcel of the money claimed’*], brings into court the sum of £——, and says, that the said sum is enough to satisfy the claim of the plaintiff in respect of the matter herein pleaded to.’” The above form is to be adopted in all cases (c), and the words “as near as may be,” “*mutatis mutandis*,” “only authorize such alteration as may be necessary in order to adapt the plea to the names of the parties, to the form of action, to the sum paid, and the like” (d).

(t) *Moses v. Levy*, 4 Q. B. 213.

(u) *Ridley v. Tindall*, 7 A. & E. 134.

(x) This does not include actions by a father for the battery of his son, *per quod serv. amisit*, in which case money may be paid into court. *Newton v. Holford*, 6 Q. B. 921.

(y) Abolished by 20 & 21 Vict. c. 85, s. 59. See s. 33.

(z) *Per Parke, B., Bishop of London v. M’Neil*, 23 L. J., Exch. 111; 9 Exch. 490, S. C.

(a) S. C.

(b) *Brangwin v. Perrot*, 2 W. Bl. 1190.

(c) *Thompson v. Sheppard*, 4 E. & B. 53.

(d) *Per Cur., Aston v. Perkes*, 15 M. & W. 390.

When money is paid into court, under the general *indebitatus* counts, such payment operates only as an admission that the plaintiff is entitled to recover, in respect of *some* contract, to the extent of the money so paid in (*e*): but where the plaintiff declares on a special contract, a payment into court admits the contract as declared on, *i. e.* the material parts of it (*f*). Hence, where in an action against two, money is paid into court by both defendants, under the above section, the plaintiff, in order to recover damages beyond the sum paid in, must show, not only that his demand, in respect of which the money is paid into court, exceeds the amount paid in, but that the defendants are joint contractors (*g*). Debt for rent on a demise for years, with an *indebitatus* count for fixtures sold; the plaintiff claimed by his particulars 5*l.* 5*s.* for rent, and 12*l.* for fixtures. The defendant paid 11*l.* 5*s.* into court, on the whole declaration, and pleaded *nunquam indeb. ultra*. It was held to be no admission of the defendant's liability in respect of fixtures, to a greater amount than had been paid into court (*h*).

By s. 73, "The plaintiff, after delivery of a plea of payment of money into court, shall be at liberty to reply to the same by accepting the sum so paid into court in full satisfaction and discharge of the cause of action in respect of which it has been paid in; and he shall be at liberty, in that case, to tax his costs of suit, and in case of non-payment thereof within forty-eight hours, to sign judgment for his costs of suit so taxed; or the plaintiff may reply, that the sum paid into court is not enough to satisfy the claim of the plaintiff in respect of the matter to which the plea is pleaded; and, in the event of an issue thereon being found for the defendant, the defendant shall be entitled to judgment and his costs of suit."

Under the above section, where money paid into court is taken out in satisfaction of part only of the plaintiff's demand, there being other issues upon which the parties are proceeding to trial, the plaintiff is not entitled to tax his costs (*i*). Where money was taken out of court by mistake, and the plaintiff's costs taxed and paid, an application subsequently made by the plaintiff for leave to set aside the replication and all subsequent proceedings, to amend his declaration and particulars, on payment of costs and refunding the money already received, with liberty to the defendant to plead *de novo*, was granted and confirmed by the court (*k*).

7. Release.

7. Release.—Defendant may plead a release after promise, and before action brought (*l*). The usual replication to a plea of release

(*e*) *Stevenson v. Corporation of Berwick*, 1 Q. B. 154.

(*f*) *Cooper v. Blick*, 2 Q. B. 915; and see *Attwood v. Taylor*, 1 M. & G. 279.

(*g*) *Archer v. English*, 1 M. & G. 873.

(*h*) *Goff v. Harris*, 5 M. & G. 573.

(*i*) *Cauty v. Gyll*, 4 M. & G. 907; 12 Pr. R. Hil. T. 1853.

(*k*) *Emery v. Webster*, 9 Exch. 242.

(*l*) See the form, Sched. B. to 15 & 16

is *non est factum*. A release, upon performance of the promise in part *quoad hoc*, will not discharge the promise for the residue (*m*). If after the last continuance the plaintiff give the defendant a release, he may plead it in bar (*n*). A plea that before breach the plaintiff *exoneravit* the defendant of the said promise, was held good on demurrer, on the ground that a promise by words might be discharged by words before breach, "*eodem modo quo oritur, eodem modo absolvitur*." *Langden v. Stokes*, Cro. Car. 383; and this decision was recognized in *King v. Gillett*, 7 M. & W. 55; in which case, to a declaration for a breach of promise of marriage, the defendant pleaded that after the promise, and before any breach thereof, the plaintiff exonerated and discharged him from his promise, and on demurrer, the plea was held good (*o*).

The 15 & 16 Vict. c. 76, s. 69, enacts, that in cases in which a plea *puis darrein continuance* has heretofore been pleadable in Banc, or at Nisi Prius, the same defence may be pleaded with an allegation, that the matter arose after the last pleading, and such plea may, when necessary, be pleaded at Nisi Prius between the 10th of August and 24th of October; but no such plea shall be allowed unless accompanied by an affidavit that the matter thereof arose within eight days next before the pleading of such plea, or unless the court or a judge shall otherwise order."

A plea *puis darrein continuance* must in all cases be accepted by a judge at Nisi Prius, even after the jury are sworn, provided it be tendered in due form and accompanied with the usual affidavit that the subject-matter of it arose within eight days of the time of its being pleaded; but it would seem that such affidavit is unnecessary where the subject-matter of the plea arose at the trial in the presence of the judge (*p*). A defendant who, after issue joined, obtained his discharge under the Insolvent Debtors Act, was allowed to plead such discharge *puis darrein continuance* without an affidavit, it being shown that the omission to plead within the prescribed time had not arisen from any culpable neglect on his part, and had occasioned no disadvantage to the plaintiff (*q*). Such a plea operates as a waiver of all pleas then remaining to be tried, but if there be an issue remaining to be tried, such a plea may be pleaded, although there be other issues on which the plaintiff has already obtained judgment (*r*).

Vict. c. 76, "That after the alleged claim accrued and before this suit the plaintiff by deed released the defendant therefrom."

(*m*) 2 Roll. Abr. 413 (H.) l. 2.

(*n*) Bull. N. P. 309.

(*o*) And see *Dodson v. Espie*, 2 H. & N. 79.

(*p*) *Todd v. Emly*, 9 M. & W. 606.

(*q*) *Dunn v. Loftus*, 8 C. B. 76.

(*r*) *Wagner v. Imbrie*, 6 Exch. 380.

8. *Statute of Limitations.*

8. *Statute of Limitations.*—By 21 Jac. I. c. 16, s. 3,—All actions upon the case (of which the action on simple contract is one), (other than slander), shall be commenced and sued within six years next after the cause of such action or suit, *and not after*. Advantage must be taken of this statute by pleading it, although it should appear on the face of the declaration that the cause of action did not arise within six years before the commencement of the action; and the defendant will not be permitted to give it in evidence on the general issue (s). The form given by schedule B. to 15 & 16 Vict. c. 76, is, "*That the alleged cause of action did not accrue within six years before this suit*" (t).

It is a general rule, that the time limited by the statute does not begin to run until there be a complete cause of action which in actions on simple contract takes place on the breach thereof. Where A., under a contract to deliver spring wheat, had delivered to B. winter wheat, and B. having resold the same as spring wheat, had in consequence been compelled, after a suit in Scotland, which lasted many years, to pay damages to his vendee, and afterwards B. brought an action against A. for his breach of contract, alleging as special damage, the damages so recovered; it was held, that although such special damage had occurred within six years before the commencement of the action by B. against A., yet that the breach of contract, which was the gist of the action, having occurred and become known to B. more than six years before that period, A. might properly plead the statute (u). And whether the breach were known or not makes no difference (x); except perhaps if it be fraudulently concealed by the defendant from the plaintiff (y), in which case it should, at all events, be specially replied (z).

In a contract to indemnify against costs, the statute begins to run from the time when they were paid (a); and so in the case of an implied contract by the drawer of an accommodation bill to indemnify the acceptor, the statute runs from the damnification of the acceptor by the payment of the bill (b), and this is so even although the bill be not paid until long after it is due, and upon the acceptor being sued (c). If goods are consigned to a factor for

(s) *Puckle v. Moore*, 1 Vent. 191; *Lee v. Rogers*, 1 Lev. 110.

(t) See *Gould v. Johnson*, Ld. Raym. 838.

(u) *Battley v. Faulkner*, 3 B. & Ald. 288; *Violet v. Simpson*, 27 L. J., Q. B. 138, *acc.* That B. might have recovered the damages to which he was *liable*, though they might never be claimed, see *Randall v. Roper*, 27 L. J., Q. B. 266.

(x) *Short v. M'Arthy*, 3 B. & Ald. 626; *Howell v. Young*, 5 B. & C. 259.

(y) *Per Abbott, C.J., Granger v. George*, 5 B. & C. 152; *per Patteson and Coleridge, JJ., Philpot v. Kelly*, 3 A. & E. 110, 117; but see *Brown v. Howard*, 2 B. & B. 73.

(z) *Clark v. Hougham*, 2 B. & C. 149.

(a) *Collinge v. Heywood*, 9 A. & E. 641.

(b) *Reynolds v. Doyle*, 1 M. & G. 753. See *Colvin v. Buckle*, 8 M. & W. 680.

(c) *Angrove v. Tippet*, 11 L. T. (N. S.) 708, Q. B.

sale on commission, no action lies against him for not accounting till after demand; the statute, therefore, in such a case runs from the time of demand made (*d*). But in the case of a note payable on demand, the statute runs from the date of the note (*e*); *secus*, however, if it be payable after a certain specified time,—*e. g.*, 24 months—after demand (*f*), or, “after sight” (*g*). In the case of a note payable “at sight,” no action lies till presentment (*h*). On a sale of goods on credit, the statute runs from the time when the credit expires (*i*). In cases of principal and surety, the statute runs from the payment by the surety of the debt, or any part of it *toties quoties* (*k*).

In an action for money had and received, to recover the consideration of an annuity, void on the ground of a defect in the memorial, but which had been treated by the grantor as a subsisting annuity for several years, and then set aside; it was held, that the Statute of Limitations did not begin to run until the grantor had made his election to avail himself of the defect in the memorial (*l*); and this although six years have in fact elapsed since the last payment of the annuity (*m*). Where a sum of money is payable by instalments, and there is an agreement between the debtor and creditor, that on nonpayment of any one of such instalments the whole shall become due, the statute runs from the first default (*n*).

The statute does not begin to run till there be a person in existence capable of suing thereon (*o*); but when once it has begun to run nothing afterwards stops its course (*p*). Thus a direction for the payment of debts in a will of personal estate will not stop the running of the Statute of Limitations, for such a direction is merely inoperative so far as the personal estate is concerned. If time has once begun to run against a debt in the debtor's lifetime, it does not afterwards cease to run during the period which may elapse between his death and the time at which a personal representative to him is constituted (*q*).

The statute bars the remedy only, not the debt (*r*). It may be pleaded to an action brought on a bill of exchange, because it is not a specialty (*s*): and to an action brought by an attorney for his

(*d*) *Topham v. Braddick*, 1 Taunt. 572.

(*e*) *Norton v. Ellam*, 2 M. & W. 461.

(*f*) *Thorpe v. Booth*, 1 R. & M. 388.

(*g*) *Holmes v. Kerrison*, 2 Taunt. 322.

(*h*) *Dixon v. Nuttall*, 1 C., M. & R. 307.

(*i*) *Helps v. Winterbottom*, 2 B. & Ad. 431.

(*k*) *Davies v. Humphreys*, 6 M. & W. 153. As to accounts with bankers, see *Pott v. Clegg*, 16 M. & W. 324; *Foley v. Hill*, 2 H. L. C. 28.

(*l*) *Cowper v. Godmond*, 9 Bingh. 748.

(*m*) *Huggins v. Coates*, 5 Q. B. 432.

(*n*) *Hemp v. Garland*, 4 Q. B. 519.

(*o*) *Murray v. East India Company*, 5 B. & Ald. 204; *Douglas v. Forrest*, 4 Bingh. 686.

(*p*) *Rhodes v. Smethurst*, 6 M. & W. 351.

(*q*) *Freakle v. Craneheldt*, 3 My. & Cr. 499, *Cottenham*, C.

(*r*) *Higgins v. Scott*, 2 B. & Ald. 413.

(*s*) *Renew v. Axton*, Carth. 3.

fees, because the fees are not of record (*t*). It is a good defence to an action by a landlord for rent, against one who had once been his tenant from year to year, but who had not, within the last six years, occupied the premises, paid rent, or done any act from which a tenancy could be inferred, although the tenancy had not been determined by a notice to quit (*u*).

The plaintiff may reply, that defendant did promise within six years, or join issue under s. 79 of the Common Law Procedure Act, 1852, and this issue will be supported by evidence of an express promise made by the defendant within six years before action brought (*x*); for it has been held, that the statute does not extinguish the plaintiff's right of action, but suspends the remedy only, and that this suspension is capable of being removed by a subsequent promise on the part of the defendant within the limited time. And not only an express promise, but a mere acknowledgment of the debt, as existing, will be sufficient to support this issue; but it must be an acknowledgment whence a promise to pay may be inferred. See *post*, pp. 172, 173,

By 9 Geo. IV. c. 14, s. 1, it is enacted, "that in actions of debt, or upon the case, grounded upon any simple contract, *no acknowledgment or promise by words only* shall be deemed sufficient evidence of a new or continuing contract, whereby to take any case out of the operation of (the Statute of Limitations), or to deprive any party of the benefit thereof, unless such acknowledgment or promise shall be made or contained by or in some *writing* (*y*), to be *signed by the party chargeable thereby* (or an agent of the party duly authorized to make such acknowledgment or promise (*z*)); and that where there shall be two or more joint contractors, or executors or administrators of any contractor, no such joint contractor, &c., shall lose the benefit of (the statute), so as to be chargeable in respect or by reason only of any written acknowledgment or promise made and signed by any other or others of them :

"Provided always, that nothing herein contained shall alter or take away or lessen the effect of any *payment* of any principal or interest made by any person whatsoever (*a*) :

(*t*) *Oliver v. Thomas*, 3 Lev. 367. See *Phillips v. Broadley*, 9 Q. B. 744; *Whitehead v. Lord*, 7 Exch. 691.

(*u*) *Leigh v. Thornton*, 1 B. & Ald. 625.

(*x*) *Dickson v. Thomson*, 2 Show. 126.

(*y*) The construction of a doubtful document given in evidence to defeat the Statute of Limitations, is for the court, and not for the jury. If the document itself be explained by extrinsic facts; *Morrell v. Fröh*, 3 M. & W. 402; or the terms of it are ambiguous, which

may be shown by extrinsic evidence; *Smith v. Thompson*, 8 C. B. 44; as in the case of words used in a mercantile sense; *Hutchinson v. Bowker*, 5 M. & W. 535; they are for the consideration of the jury. And see *per Parke, B.*, in *Neilson v. Harford*, 8 M. & W. 823.

(*z*) 19 & 20 Vict. c. 97, s. 13.

(*a*) This provision is still in force with respect to the party paying, to revive his *individual* liability, but part payment will no longer revive the liability of a *co-contractor or co-debtor*, *post*, p. 175.

" Provided also, that in actions to be commenced against two or more such joint contractors, &c., if it shall appear at the trial or otherwise, that the plaintiff, though barred by (the Statute of Limitations) or this act, as to one or more of such joint contractors, &c., shall nevertheless be entitled to recover against any other or others of the defendants, by virtue of a new acknowledgment or promise, or otherwise, judgment may be given and costs allowed for the plaintiff as to such defendant or defendants against whom he shall recover, and for the other defendant or defendants against the plaintiff."

By sect. 2, it is enacted,

" That if any defendant or defendants in any action on any simple contract shall plead any matter in abatement, to the effect that any other person or persons ought to be jointly sued, and issue be joined on such plea, and it shall appear at the trial that the action could not, by reason of the said (Statute of Limitations) or this act or of either of them, be maintained against the other person or persons named in such plea, or any of them, the issue joined on such plea shall be found against the party pleading the same."

By sect. 3, it is provided,

" That no endorsement or memorandum of any payment written or made after the time appointed for this act to take effect (1st of Jan., 1829), upon any promissory note, bill of exchange, or other writing, by or on behalf of the party to whom such payment shall be made (b), shall be deemed sufficient proof of such payment, so as to take the case out of the operation of (the statute)." And by sect. 4 it is further provided,—“That (the Statute of Limitations) and this act shall be deemed and taken to apply to the case of any debt on simple contract alleged by way of set-off on the part of any defendant, either by plea or otherwise."

" This statute did not intend to make any alteration in the legal construction to be put upon acknowledgments or promises made by defendants, but merely to require a different mode of proof, substituting the certain evidence of a writing signed by the party chargeable (or his agent), instead of the insecure and precarious testimony to be derived from the memory of witnesses. To inquire, therefore, whether in a given case the written documents amount to an acknowledgment or promise, is no other inquiry than whether the same words, if proved before the statute to have been *spoken* by the defendant, would have had a similar operation and effect" (c).

Where, in an action for money due on an accountable receipt, the plaintiff, in order to take the case out of the Statute of Limita-

(b) That if made by the party paying it would be sufficient; see *Purdon v. Purdon*, 10 M. & W. 562.

(c) Per Tindal, C. J., *Haydon v. Williams*, 7 Bingh. 163.

tions, called a witness, who proved that he called on defendant, and showed him the receipt, and asked him if he knew anything of it, to which defendant answered that he knew all about it; witness then asked him for the amount, to which he answered, it was not worth a penny; he should never pay it; that it was his signature, but that he never had and never would pay it, "and besides," he added, "it is out of date, and no law shall make me pay it;" it was held, that this evidence was insufficient to charge the defendant with it, for there was not any acknowledgment, but the contrary, that the debt ever existed (*d*). Where the acknowledgment proved was, "I cannot pay the debt at present, but I'll pay it as soon as I can," it was held, that such an acknowledgment, without proof of any ability, would not take the case out of the statute (*e*). So where the fair import of a letter was that the defendant was not certain whether the debt was due, but would have it inquired into, though expressing a regret that it had been so long unpaid (*f*).

But where the defendant wrote as follows:—"I have received your bill. It does not specify sufficiently to which cottages the work is done; for instance, as to some of the items, I do not know where all this is done. I shall feel obliged if you will more particularly explain. It is my wish to settle your account immediately, but being at a distance I wish everything very explicit and correct. I have asked H. to mark the agreements, and send them to me, and I will return them by the first post, with instructions to pay, if correct,"—this was held sufficient (*g*). "The question in these cases is, whether the statements as to the time of payment are merely excuses for not paying, or whether they are conditions on which payment is to be made" (*h*).

"All the cases proceed upon the principle, that, under the ordinary issue on the Statute of Limitations an acknowledgment is only evidence of a promise to pay; and unless it is conformable to and maintains the promises in the declaration, though it may show to demonstration that the debt has never been paid, and is still subsisting, it has no effect. The question then comes to this: is there any promise in this case (see *supra*) which will support the promises in the declaration? The promises in the declaration are absolute and unconditional, to pay when thereunto afterwards requested; the promise proved here was 'I'll pay as soon as I can' (*i*); and there was no evidence of ability to pay, so as to raise that which in its terms was a qualified promise, into one that was absolute and unqualified. Upon a general acknowledg-

(*d*) *Rowercroft v. Lomas*, 4 M. & S. 457.

(*e*) *Tanner v. Smart*, *infra*.

(*f*) *Collinson v. Margesson*, 27 L. J., Exch. 305.

(*g*) *Sidwell v. Mason*, 2 H. & N. 306.

(*h*) *Per Pollock*, C. B., *Collis v. Stack*, 1 H. & N. 607.

(*i*) *Acc. Rackham v. Marriott*, 2 H. & N. 196.

ment, where nothing is said to prevent it, a general promise to pay may and ought to be implied; but where the party guards his acknowledgment, and accompanies it with an express declaration, to prevent any such implication, why shall not the rule *expressum cessare facit tacitum* apply (*k*)? Since this case, many of the older cases on this subject cannot be sustained (*l*); *Linsell v. Bonsor*, where it was held, that it was properly left to the jury to consider whether the acknowledgment was one from which a promise to pay could be implied (*m*). When such ability to pay as is mentioned in *Tanner v. Smart* is proved, the promise becomes sufficient, and the statute runs from the time of such ability (*n*).

Defendant, by a deed, reciting that he was indebted to plaintiff and others, assigned his property to plaintiff and others in trust to pay all such creditors as should sign the schedule of debts annexed, with a proviso, that if all the creditors whose debts amounted to a certain sum did not sign by a fixed day, the deed should be void; the plaintiff never executed the deed, nor was the amount of his debt anywhere stated; this was held not to be a sufficient acknowledgment (*o*); but it has since been held, that the acknowledgment need not specify the amount of the debt, which may be shown by extrinsic evidence (*p*). Hence a general promise in writing, not specifying the amount, but which can be made certain as to the amount by extrinsic evidence, is sufficient (*q*); but a promissory note improperly stamped is not (*r*). There must be an absolute acknowledgment that some debt is due (*s*); and this acknowledgment must be before action brought (*t*).

Where two parties meet and go through an account in which there are items on both sides and strike a balance, this is evidence of an agreement that the items of one account should be set off against the earlier items of the other (converting the set-offs into payments), whence arises a new consideration for the payment of the balance, and the case is taken out of the operation of the Statute of Limitations (*u*). So to constitute a payment of interest sufficient to take a debt out of the operation of the statute, it is not essential that money should actually pass (*x*).

Where the fair import of the writing is not to render the party signing chargeable, but only refers to others by whom the debt is

(*k*) *Tanner v. Smart*, 6 B. & C. 603.
See *Irving v. Veitch*, 3 M. & W. 90.

(*l*) *Per Tindal*, C. J., 2 B. N. C. 244, 245.

(*m*) The case of *Tanner v. Smart* has been frequently confirmed. See *Smith v. Thorne*, 18 Q. B. 134.

(*n*) *Hammond v. Smith*, 33 Beav. 452.

(*o*) *Kennett v. Milbank*, 8 Bingh. 38.

(*p*) *Lechmere v. Fletcher*, 1 C. & M.

626; *Waller v. Lacy*, 1 M. & G. 54.

(*q*) *Bird v. Gammon*, 3 B. N. C. 883;
Gardner v. M'Mahon, 3 Q. B. 561.

(*r*) *Jones v. Ryder*, 4 M. & W. 32.

(*s*) *Spong v. Wright*, 9 M. & W. 629.

(*t*) *Bateman v. Pinder*, 3 Q. B. 574.

(*u*) *Ashby v. James*, 11 M. & W. 542.
See *Worthington v. Grimsditch*, 7 Q. B. 481.

(*x*) *Mabe v. Mabe*, 2 L. R. 153, Ex.

to be paid, it is not sufficient to bring the case within this act (y).

Since this statute it has been held, that where the written promise has been lost, oral evidence may be given of its contents (z). So a verbal acknowledgment of part payment of a debt is sufficient to take the case out of the statute (a). So evidence of oral declarations may be received to corroborate other proofs of that fact, as the appropriation of the sum paid to a particular debt (b).

It would seem that it is sufficient if the acknowledgment is made to a third person (c).

Part payment.—Delivery of goods by agreement between debtor and creditor in reduction of demand, operates as payment within this statute (d). The mere fact of part payment does not necessarily take the case out of the statute; it is only evidence to go to the jury of a promise to pay the residue (e); and if made under such circumstances as to negative any inference to that effect is not sufficient. Thus, the payment of a dividend on a promissory note by order of the Insolvent Court has been held not sufficient (f). So to a declaration alleging that the defendant delivered his promissory note payable on demand with interest to the plaintiff, but neglected to pay, except interest, which he paid up to a day within six years, a plea that the cause of action did not accrue within six years was held sufficient, for the allegation that interest had been paid is only evidence to take the case out of the statute, but is not conclusive (g). The circumstance that the defendant is a surety only makes no difference (h); or that the payment is made for interest only (i). It is immaterial that the payment be made more than six years after the original debt becomes due, provided it be made within six years before action brought (k); or that the party paying is about to be a bankrupt, and the jury find that he made the payment in fraud of his partners, in expectation of immediate bankruptcy, and in concert with the plaintiffs (l). Generally speaking, where there are two separate debts, if a payment is shown, it is a question for the jury whether it was not applicable to all the debts (m). But a payment clearly appropriated to a

(y) *Whippy v. Hillary*, 3 B. & Ad. 399; *Routledge v. Ramsay*, 8 A. & E. 224.

(z) *Haydon v. Williams*, 7 Bingh. 163.
(a) *Cleave v. Jones (in error)*, 6 Exch. 573. See *Trentham v. Deverill*, 3 B. N. C. 397.

(b) *Bevan v. Gethin*, 3 Q. B. 740.

(c) *Halliday v. Ward*, 3 Campb. 32; per *Patteson, J.*, in *Gale v. Capern*, 1 A. & E. 104; but see *Cripps v. Davies*, 12 M. & W. 159.

(d) *Hooper v. Stephens*, 4 A. & E. 471.

(e) *Wainman v. Kynman*, 1 Exch. 118. See *Ridd v. Moggridge*, 2 H. & N. 567.

(f) *Davies v. Edwards*, 7 Exch. 22. See *Brandram v. Wharton*, 1 B. & Ald. 463.

(g) *Hollis v. Palmer*, 2 B. N. C. 713.

(h) *Perham v. Raynal*, 2 Bingh. 306.

(i) *Bealey v. Greenslade*, 2 C. & J. 61.

(k) *Channell v. Ditchburn*, 5 M. & W. 494.

(l) *Goddard v. Ingram*, 3 Q. B. 839.

(m) *Walker v. Butler*, 6 E. & B. 506.

specific debt, where more than one exists, has no operation on the other (*n*); and where a payment is made, but it is left in doubt as to which of one or more specific debts it is applicable, it seems it will not take either out of the statute (*o*).

Many of the above cases, in addition to the question whether the part payment was sufficient as against the party paying, decided also, that the payment by one contractor revived the liability of his co-contractor, and this was well established law (*p*), except, perhaps, in the case of the co-executors of a single contractor (*q*); but now by 19 & 20 Vict. c. 97 (The Mercantile Law Amendment Act), it is provided, that, "in reference to the provisions of the 21 Jac. I. c. 16, s. 3, and of the 3 & 4 Will. IV. c. 42, s. 3, and of the 16 & 17 Vict. c. 113, s. 20, when there shall be two or more co-contractors or co-debtors, whether bound or liable jointly only or jointly and severally, or executors or administrators of any contractor, no such contractor or co-debtor, executor or administrator, shall lose the benefit of the said enactments or any of them, so as to be chargeable in respect or by reason only of payment of any principal, interest or other money by any other or others of such co-contractors or co-debtors, executors or administrators." (Sect. 14.) This section is not retrospective (*r*).

Since the passing of 9 Geo. IV. c. 14, the existence of items in an open account within six years will not operate to take the previous portion of the account out of the Statute of Limitations (*s*). In *Cotes v. Harris*, Bull. N. P. 149, *Denison*, J., held, that where all the items are on one side, as in an account between a tradesman and his customer, the last item which happens to be within six years shall not draw after it those that are of a longer standing.

The exception as to merchants' accounts (see *Inglis v. Haigh*, 8 M. & W. 781) originally contained in the 21 Jac. I. c. 16, s. 3, and continued by the above statute, has been repealed by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 9.

A party suing, and seeking to avail himself of the law of a particular country, must take the law as he finds it (*t*). Hence, where in an action of debt it was averred, that the plaintiffs carried on business in Scotland, and that one A. B. and the defendant were resident and domiciled therein; and that by a certain obligation

(*n*) *Burn v. Boulton*, 2 C. B. 476.

(*o*) *Ibid.*

(*p*) See *Whitcomb v. Whiting*, Dougl. 652; *Wyatt v. Hodson*, 8 Bingh. 309.

(*q*) *Scholey v. Walton*, 12 M. & W. 510.

(*r*) *Jackson v. Woolley*, 6 W. R. 686, Exch. Ch.

(*s*) *Cottam v. Partridge*, 4 M. & G. 271.

(*t*) As regards the remedy only, *i. e.*,

the procedure, to which the law of prescription belongs, not as regards the rights and merits of the contract, which are determined by the law of the country where the contract is made. *Per Tindal*, C. J., *Huber v. Steiner*, 2 B. N. C. 210. The same rule applies to contracts made abroad, invalid here by the Statute of Frauds. *Leroux v. Brown*, 12 C. B. 801.

the said A. B. and the defendant became bound, jointly and severally, to pay to the plaintiffs a sum of money; and that, by the law of Scotland, the time for suing thereon had not yet elapsed; that is, by the said law the plaintiffs had the right of suing thereon at any time within *forty* years from the making thereof, a plea, that the cause of action did not accrue within *six* years, was held, on demurrer, to be a sufficient answer to the action (*u*).

The issue on a plea of the Statute of Limitations is, when the cause of action accrued; and, therefore, where in an action by an executor the defendant pleaded the statute, and the plaintiff replied that within six years before suit *letters testamentary* were granted to him, the replication was held bad; the court observing, that the time of limitation must be computed from the time when the action first accrued to the testator, and not from the time of proving the will; that the proving the will did not give any new cause of action, and consequently the time when it was done was immaterial (*x*). So where, to an action brought by the assignee of a bankrupt, the defendant pleaded the Statute of Limitations; the plaintiff replied the bankruptcy and assignment, and that the cause of action arose within six years next before the assignment; the replication was held bad; the court observing, that the statute would be defeated as to all simple contracts if an assignment, at the end of five years and a half, was to set all at large again (*y*). See *ante*, p. 168.

By 21 Jac. I. c. 16, s. 4, it is enacted, "That if judgment be given for the plaintiff and reversed by error, or the judgment be arrested, or if the defendant be outlawed, and the outlawry reversed; the plaintiff, his heirs, executors, or administrators, may commence a new action or suit from time to time *within a year* after such judgment given or outlawry reversed" (*z*).

Within the equity of the preceding section, the courts permitted an executor or administrator, within a year or within a reasonable time after the death of the testator or intestate, to renew a suit commenced by the testator or intestate, and *vice versâ* (*a*). But now by the 15 & 16 Vict. c. 76, it is enacted (s. 135), that "the death of a plaintiff or defendant shall not cause the action to abate, but that the surviving plaintiff (if the cause of action survives to him) may proceed, on entering a suggestion of the death of his co-plaintiff on the record," (s. 136), or "in case of the death of a sole plaintiff or sole surviving plaintiff, the legal representative of such plaintiff may, by leave of the court or a judge, enter a suggestion of the death, and that he is such legal representative,

(*u*) *The British Linen Company v. Drummond*, 10 B. & C. 903.

(*x*) *Hickman v. Walker*, Willes, 27.

(*y*) *Gray v. Mendez*, 1 Str. 556.

(*z*) A similar provision as to actions on specialties is enacted by 3 & 4 Will. IV.

c. 42, s. 6.

(*a*) See *Karver v. James*, Willes, 255; *Willcox v. Huggins*, Str. 907; Fitzg. 170, S. C.; *Curlewis v. Lord Mornington*, 7 E. & B. 283.

and the action shall thereupon proceed; and if such suggestion be made before the trial, the truth of the suggestion shall be tried thereat, together with the title of deceased plaintiff, and such judgment shall follow upon the verdict in favour of or against the person making such suggestion, as if such person were originally the plaintiff" (s. 137). If the death of the plaintiff takes place after interlocutory and before final judgment, the executor, if he might originally have maintained the action, is entitled to a writ of revivor according to a form given in the schedule to the act (s. 140). If the plaintiff die after verdict and before judgment, judgment may be entered within two terms after such verdict (s. 139). The 138th section provides for the action proceeding, in case of the death of the defendant, against his personal representative.

By the Common Law Procedure Act, 1854, it is provided, that—

"It shall be lawful for the defendant (or plaintiff in replevin), in any cause, &c. in which if judgment were obtained he would be entitled to relief against such judgment on *equitable* grounds, to plead the facts which entitle him to such relief by way of defence, and the said courts are hereby empowered to receive such defence by way of plea, provided that such plea shall be given with the words 'for defence on equitable grounds,' or words to the like effect" (s. 83).

By s. 84, "Any such matter which if it arose before or during the time for pleading would be an answer to the action by way of plea, may, if it arise after the lapse of the period during which it could be pleaded, be set up by way of *audita querelâ*."

By s. 85, "The plaintiff may reply in answer to any plea of the defendant facts which would avoid such plea upon equitable grounds, provided that such replication shall begin with the words 'for replication on equitable grounds,' or words to the like effect" (b).

Under the last-mentioned section, facts which in equity would prevent the Statute of Limitations from running, *e. g.*, a trust created by will for payment of debts (c), do not constitute a good answer to a plea of the statute. *Pollock*, C. B., said, "The 85th section of the Common Law Procedure Act, 1854, cannot alter the effect of the Statute of Limitations in courts of law" (d).

Exceptions.—By the 7th section of 21 Jac. I. c. 16, "If any person or persons that is or shall be entitled to any such action of trespass, detinue, action *sur trover*, replevin, actions of account, actions of debt, actions of trespass for assault, menace, battery, wounding, or imprisonment, actions upon the case for words, be or

(b) By s. 85, power is given to the court or a judge to strike out such plea or replication upon terms, if "it cannot be dealt with by a court of law so as to

do justice between the parties."

(c) See *Burke v. Jones*, 1 V. & B. 275.

(d) *Gulliver v. Gulliver*, 1 H. & N. 174.

shall be, at the time of any such cause of action given or accrued, fallen or come, within the age of twenty-one years, *feme covert*, *non compos mentis*, imprisoned, or beyond the seas (*e*), then such person or persons shall be at liberty to bring the same actions, so as they take the same within such times as are before limited after their coming to or being of full age, *discovert* (*f*), of sane memory, at large, or returned from beyond the seas, as other persons having no such impediment should have done." By 3 & 4 Will. IV. c. 42, s. 7, "No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, and Sark, nor any islands adjacent to any of them, being part of the dominions of his Majesty, shall be deemed to be beyond the seas within the meaning of this act or the act (of 21 Jac. I. c. 16)".

By the omission to mention the 4 & 5 Ann. c. 16 (s. 19), in the above section, Ireland was, notwithstanding the act of Union, held to be "beyond seas," within the meaning of the statute of Anne (*g*), but now, by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, s. 12, "No part of the United Kingdom of Great Britain and Ireland, nor the Islands of Man, &c. (as in the above section) shall be deemed to be beyond seas *within the meaning of the 4 & 5 Anne, c. 16, or of this act.*"

An action of simple contract, although it is not expressly mentioned, is within the equity of the preceding clause of the statute of James (*h*). The exceptions therein contained are confined to the persons enumerated, and do not extend to persons impeded by the obstruction of justice, or otherwise (*i*). So it is not any answer to a plea of the statute, that after the cause of action accrued, and the statute had begun to run, the debtor died, and that (by reason of litigation as to the right of probate) an executor of his will was not appointed until after the expiration of the six years, and that the plaintiff sued such executor within a *reasonable* time after probate granted (*k*). If the plaintiff be in England when the cause of action accrues, the time of limitation begins to run, and a subsequent departure from the kingdom and going beyond the seas will not entitle the plaintiff or his representative to maintain an action after the expiration of the limited time (*l*). When the disability is once removed, and the statute has begun to run, no subsequent disability will stop the running (*m*).

(*e*) These words in such cases as India, where a debtor may be practically abroad, though not literally "beyond seas," *e. g.*, if he be in Persia, Cabul, &c., are construed to mean "out of the territories of the East India Company." *Ruckmaboye v. Mottichand*, 5 Moo. Ind. App. (P. C.) 234.

(*f*) See *Richards v. Richards*, 2 B. & Ad. 447.

(*g*) *Lane v. Bennett*, 1 M. & W. 70.

(*h*) *Chandler v. Vilett*, 2 Wms. Saund.

120; *Rochtschilt v. Leibman*, 2 Str. 836, and Fitz. 81.

(*i*) *Benyon v. Evelyn*, Bridgman's Judgments from Hargrave's MSS., by Bannister, p. 324; where see as to the inconveniences which would arise from an equitable construction of the statute.

(*k*) *Rhodes v. Smethurst*, (Exch. Cham.) 6 M. & W. 351.

(*l*) *Smith v. Hill*, 1 Wils. 134.

(*m*) See the opinion of Lord Kenyon, C. J., in *Doe v. Jones*, 4 T. R. 311, where

The exception in the 7th section of the 21 Jac. I. c. 16, as to persons being beyond the seas, extended only to the case of *plaintiffs*, and not to that of *defendants* (n). But by 4 Ann. c. 16, s. 19, it is enacted, that "If any person or persons *against* whom there is or shall be any cause of action upon the case (o), or any of them, be or shall be, at the time of any such cause of suit or action given or accrued, fallen or come beyond the seas, then such person or persons who is or shall be entitled to any such suit or action shall be at liberty to bring the said actions against such person or persons *after* their return from beyond the seas, so as they take the same within such times as are respectively limited for the bringing of the said actions, before by this act and by the said other act made in the 21 Jac. I."

Under the above section, it is a sufficient reply to a plea of the statute, that the defendant was in the East Indies at the time of the cause of action accrued, and that the plaintiff commenced his suit against the defendant within six years after his return to this kingdom; and it is no answer to this to say, that when the cause of action accrued, both the plaintiff and defendant were resident in India, within the jurisdiction of the same court, and that the defendant, after the cause of action accrued, remained more than six years in India, within the said jurisdiction (p). But a defendant who was beyond seas at the time of the cause of action accruing, and still is so, *may* be sued during his continuance abroad, as well as after his return (q). A return to this country for a few days only, and without any *animus revertendi*, as by a ship touching at a port in this country, is, it seems, sufficient to set the statute running (r).

The exceptions created by the preceding section of the statute of James were five in number, *viz.*, infancy, coverture, insanity, imprisonment, and absence beyond seas. The effect of the two latter exceptions, however, has been much limited by the Mercantile Law Amendment Act, 19 & 20 Vict. c. 97, which, by s. 10, enacts that—

"No person or persons who shall be entitled to any action or suit, with respect to which the period of limitation within which the same shall be brought is fixed by the" 21 Jac. I. c. 16, s. 3; 4 Ann. c. 16, s. 17; 53 Geo. III. c. 127, s. 5; 3 & 4 Will. IV. c. 27, ss. 40, 41, 42; 3 & 4 Will. IV. c. 42, s. 3; 16 & 17 Vict. c. 113, s. 20; "shall be entitled to any time within which to commence and sue such action or suit, beyond the period so fixed for the same by the enactments aforesaid, by reason only of such person, or some

that learned judge speaks of the uniform construction of *all* the statutes of limitation in this respect; and see *ante*, p. 161.

(n) *Hall v. Wybourn*, Carth. 136.

(o) Several other actions besides *assumpsit* are mentioned in this statute.

(p) *Williams v. Jones*, 13 East, 439.

(q) *Forbes v. Smith*, 11 Exch. 161.

(r) *Gregory v. Hurvill*, 5 B. & C. 341.
See the facts fuller stated, 1 Bing. 328, 333, S. C.

one or more of such persons, being at the time of such cause of action or suit accrued *beyond the seas*, or in the cases in which, by virtue of any of the aforesaid enactments, imprisonment is now a disability by reason of such person, or some one or more of such persons, *being imprisoned* at the time of such cause of action or suit accrued."

The above section would, it seems, apply to foreigners as well as to English subjects (s); but only to plaintiffs, and not to defendants (t). It has introduced no change with regard to joint plaintiffs, where one or more of them only are beyond seas (or in prison) at the time of the cause of action accruing, for before the above statute it was held, that where there were several partners, some of whom were in England and others beyond seas, when the cause of action accrued, the action must nevertheless have been brought within six years next after the cause of action accruing, notwithstanding the absence of the others beyond seas (u); but now a sole plaintiff, or joint plaintiffs (whether foreigners or not), all or any of whom are beyond seas, or in prison, at the time of the cause of action accruing, must sue within the six years. This section is retrospective, and applies to persons in prison at the passing of the act (29th January, 1856) (x).

By the 11th section of the last-mentioned act, it is enacted, that "Where such cause of action or suit, with respect to which the period of limitation is fixed by the enactments aforesaid, or any of them, lies against two or more joint debtors, the person or persons who shall be entitled to the same shall not be entitled to any time within which to commence and sue any such action or suit against any one or more of such joint debtors who shall not be beyond the seas at the time such cause of action or suit accrued, by reason only that some other one or more of such joint debtors was or were at the time such cause of action accrued beyond the seas,—and—Such person or persons so entitled as aforesaid shall not be barred from commencing and suing any action or suit against the joint debtor or joint debtors who was or were beyond seas at the time of the cause of action or suit accrued, after his or their return from beyond seas, by reason only that judgment was already recovered against any one or more of such joint debtors who was not or were not beyond seas at the time aforesaid."

The above section, it will be observed, only applies to cases of *joint* defendants; in which case it was held, previously to the above statute, that if one of two or more joint defendants were beyond seas at the time when the cause of action accrued, the statute did not begin to run against *any* of them till all were returned, or those beyond seas dead (y); because the defendants remaining in

(s) *Le Vaux v. Berkeley*, 2 D. & L. 31.

(t) *Hall v. Wybourn*, Carth. 136.

(u) *Perry v. Jackson*, 4 T. R. 516.

(x) *Cornill v. Hudson*, 27 L. J., Q. B. 8.

(y) *Towns v. Mead*, 16 C. B. 123.

this country, who could alone be brought before the courts here, might be insolvent (*z*); and a judgment against one or more of them would be a bar to any action against those who were abroad on their return home (*a*). The latter difficulty is met by the second part of the above section; the former by the provisions of the Common Law Procedure Act, 1852, with respect to suing defendants, whether British subjects or foreigners, resident without the jurisdiction of the superior courts.

The principle of the following cases, decided before the late statute, on "absence beyond seas," would still be applicable to cases of infancy, coverture and insanity, some or one of them.

If the plaintiff, whether Englishman or foreigner, is (beyond sea) at the time when the cause of action accrues, he still has six years after (his return) in which to bring the action, however long he may have continued (abroad), and if he never (comes to England), his right of action is not barred either against himself or his executors or administrators, after his death, who have six years at all events to bring the action in (*b*). If a plaintiff be (beyond seas) at the time the cause of action accrued, he *may* sue at any time before (his return), as well within the time limited as after (*c*).

9. *Set-off*.

9. *Set-off*.—At common law, if the plaintiff was indebted to the defendant, inasmuch or even more than the defendant owed to him, yet the defendant had not any method of setting off such debt in the action brought by the plaintiff for the recovery of his debt, and consequently the defendant was driven to a cross action. To obviate this inconvenience, and to prevent circuity of action, or a bill in equity, it was enacted by 2 Geo. II. c. 22, s. 13 (made perpetual by 8 Geo. II. c. 24, s. 4) that:—"Where there are mutual debts between the plaintiff and defendant, or if either party sue or be sued as executor or administrator, where there are mutual debts between the testator or intestate, and either party, one debt may set against the other."

And by 8 Geo. II. c. 24, s. 5, it was enacted and *declared*, that:—"By virtue of the (preceding clause), mutual debts may be set against each other—notwithstanding that such debts are deemed in law to be of a different nature; unless in cases where either of the said debts shall accrue by reason of a penalty contained in any bond or specialty; and in all cases where either the debt for which the action had been or shall be brought, or the debt

(*z*) See *Fannin v. Anderson*, 7 Q. B. 811.

(*a*) *King v. Hoare*, 13 M. & W. 494.

(*b*) *Townsend v. Deacon*, 3 Exch. 706, where *Parke, B.*, expressed a doubt whether executors or administrators in such a case are bound to sue even within the

six years.

(*c*) *Le Vaux v. Berkeley*, 4 Q. B. 836; *Pigott v. Rush*, 4 A. & E. 912, the latter a case of a plaintiff in prison. And see *Sturt v. Mellish*, 2 Atk. 613; *Perry v. Jackson*, *ante*, p. 165.

intended to be set against the same, hath accrued or shall accrue by reason of any such penalty, the debt intended to be set off shall be pleaded in bar, in which plea shall be shown how much is truly and justly due on either side; and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid."

1. The set-off must be for a *debt*, such as an action of *indebitatus assumpsit* will lie for (*d*). A claim therefore merely sounding in damages, and not capable of being liquidated at the time of pleading, *e. g.* a contract to indemnify A. from all such sums as he should advance to B., cannot be set off (*e*). See *post*, tit. "Debt on Bond," "Set-off."

2. The debts sued for, and the debts intended to be set off, must be *mutual*, and *due in the same right* (*f*). Hence a joint debt cannot be set against a separate demand (*g*); nor a separate debt against a joint demand (*h*). But a debt due to the defendant, as surviving partner, may be set against a demand on defendant in his own right (*i*); and *e converso*, a debt due from the plaintiff, as surviving partner, may be set against a debt due from defendant to the plaintiff in his own right (*k*). If a plaintiff sue a single defendant on what is in fact a joint debt from the defendant and A., the defendant may set off a debt due from the plaintiff to him and A., without pleading the non-joinder in abatement (*l*). The corporation of P. (who were also managers of the public baths and wash-houses, and the local board of health) kept three separate accounts at their bankers, viz., 1. The corporation account. 2. The baths and wash-houses account. 3. The local board account. Upon the first account they were indebted to the bank, and upon the other two the bank was indebted to them in an equal amount. In an action brought by the banker to recover the balance due to him on account No. 1, it was held that the corporation were entitled to set off the debts due to them on the other two accounts, as they were debtors and creditors of the bank *in the same right* (*m*).

A defendant, sued as executor or administrator, cannot set off a debt due to himself personally, nor can a person who is sued for his own debt set off what is due to him as executor or administrator. "The stat. 2 Geo. II. c. 22, s. 13, says, '*or if either party sues or is sued as executor or administrator*, where there are mutual debts between the testator or intestate and either party, one debt may be set against the other;' so that it is confined by

(*d*) *Per Ashurst, J., Howlett v. Strickland*, Cowp. 56.

(*e*) *Morley v. Inglis*, 4 B. N. C. 58.

(*f*) *Gale v. Luttrell*, 1 Y. & J. 180.

(*g*) *Arnold v. Bainbrigge*, 9 Exch. 153.

(*h*) *France v. White*, 6 B. N. C. 33.

See *Gordon v. Ellis*, 2 C. B. 821.

(*i*) *Slipper v. Stidstone*, 5 T. R. 493.

(*k*) *French v. Andrade*, 6 T. R. 582.

(*l*) *Stackwood v. Dunn*, 3 Q. B. 822.

(*m*) *Pedder v. The Mayor and Corporation of Preston*, 12 C. B. (N. S.) 535.

the statute expressly to cases where the suit is as executor or administrator" (n). Hence where an executor sues for a cause of action arising *after* the death of the testator, the defendant cannot set off a debt due to him from the testator (o), for to allow this would be to alter the course of distribution (p); A. having been appointed by B., his attorney, to receive his rents, did, after B.'s death, receive rent due to B. in his lifetime; the executrix of B. brought an action against A. for the money *in her own name*; the defendant gave notice to set off a debt due to him from the testator, which was not allowed at the trial, because the suit not being as executor, the case was not within the statute. The court of C. P., on a case made, concurred in opinion with the judge who tried the cause (q). The same rule holds where the plaintiff declares as executor, if the cause of action arose after the death of the testator. In an action by the plaintiff, as executor (r), for goods sold and delivered to the defendant by the plaintiff, as executor, the defendant pleaded a set-off for a debt due from the testator to the defendant. On demurrer, the court held the plea bad: for to allow a set-off in this case would be altering the course of distribution (s).

So if the cause of action arises partly in the time of the testator and partly in the time of the executor, although the plaintiff declares as executor, yet the defendant cannot set off a debt due from the testator to him. In covenant by the plaintiffs as executors, for rent arrear in the lifetime of the testator, and also since his death, the defendant, at the trial before Lord *Mansfield*, C. J., set off a debt due from the testator to him; and the plaintiffs were nonsuited. Erskine moved for a new trial, on the ground that this debt could not be set off in this case, and Lord *Mansfield*, C. J., said that he was satisfied on the point on the authority of *Kilvington v. Stevenson*, and made the rule absolute (t). If the executor be defendant, sued for a debt which accrued to the plaintiff from the testator in his lifetime, the executor cannot set off a debt due to him as such, since the testator's decease (u). But if he be sued on an account stated by him as such since the testator's decease, he may set off a debt due from the plaintiff to the testator in his lifetime (x); for an account stated by an executor as such must be taken to show a debt due from his testator to the other party, and against this it is clear that a debt due from that other party to the testator may be set off (y).

3. A debt barred by the Statute of Limitations cannot be set

(n) *Per Fortescue, B.*, in *Shipman v. Thompson*, *infra*.

(o) *Houston v. Robertson*, 4 Campb. 342.

(p) Bull. N. P. 180, n. (b).

(q) *Shipman v. Thompson*, Willes, 103.

(r) *Kilvington v. Stevenson*, cited Willes, 264.

(s) Durnford's note, Willes, 264.

(t) *Teggetmeyer v. Lumley*, cited Willes, 264, *in notd*.

(u) *Mardall v. Thellusson*, 6 E. & B. 976.

(x) *Blakesley v. Smallwood*, 8 Q. B. 538.

(y) *Rees v. Watts*, 11 Exch. 416, *per Cur.*

off (z), "for the remedy by way of set-off was intended to supersede the necessity of a cross action, and a debt barred by the statute cannot be recovered by action." If such debt be pleaded in bar to the action, the plaintiff may reply the Statute of Limitations (a); if the six years have expired at the commencement of the action (b), but a debt of a legatee to the testator, though barred by the statute, may be set off against a legacy (c). An attorney may set off his bill, though he could not have recovered upon it, not having delivered it duly signed a month before action, but in such a case he must deliver it in time to have it taxed before trial (d).

4. Where either of the debts accrues by reason of a penalty, the plea of set-off must show what is "truly and justly due on either side" (e); and the averment has been held to be traversable (f).

5. The court, under the statutes of set-off, could take notice of an interest at law only (g); and as it had been determined that any defence good against a plaintiff on the record, who was suing as a trustee merely, was good against the *cetteux que trusts* who were using his name (h), the fact that the plaintiff was suing as a trustee, was no answer to a plea of set-off. But by the Common Law Procedure Act, 1854, equitable pleadings are in some cases allowed (*ante*, p. 162). Hence, an equitable replication setting out these facts would, it would seem, now be a good answer to such a plea (i). And as it is the established rule of equity with reference to set-off to look upon the beneficial owner as real owner, and by injunction to compel other courts to disregard the legal title of the trustee, a defendant may plead a set-off for debts due by plaintiff to his trustee as such (j), and so conversely a defendant may set off against a trustee's claim as such a debt due to him from the *cestui que trust* (k). Where in an action against executors for work done, money lent, &c., to the testator, the defendants pleaded a set-off for money due from the plaintiff to the testator for the use and occupation of premises, money lent, &c., and the plaintiff replied "on equitable grounds," that the testator bequeathed to him and his children certain sums, and declared by his will that the money and other effects *already* delivered by him to the plaintiff and his children should be deemed advancements, and that they should not be required to account for the same, the Court of Exchequer held the replication bad on demurrer (l).

(z) *Per Willes*, C. J., *Hutchinson v. Sturges*, Willes, 262.

(a) *Remington v. Stevens*, Str. 1271.

(b) *Walter v. Clements*, 15 Q. B. 1046.

(c) *Coates v. Coates*, 33 Beav. 249.

(d) *Hooper v. Till*, 1 Dougl. 199, *in notis*.

(e) 8 Geo. II. c. 24, s. 5; *Attwooll v. Attwooll*, 2 E. & B. 23. A misstatement in this respect would (*semble*) be matter of form only (*per Campbell*, C. J., *S. C.*) and amendable. *Symmons v. Knox*, 3 T.

R. 65.

(f) *Grimwood v. Barrit*, 6 T. R. 460.

(g) *Per Littledale*, J., in *Tucker v. Tucker*, 4 B. & Ad. 751.

(h) *Gibson v. Winter*, 5 B. & Ad. 96.

(i) *De Polhonier v. De Mattos*, 2 B. & E.

(j) *Cochrane v. Green*, 9 C. B. (N. S.) 448; 30 L. J. 97 C. P.

(k) *Agra and Masterman's Bank v. Leighton*, 2 L. R. 65 Ex.

(l) *Gulliver v. Gulliver*, 1 H. & N. 174.

Under the operation of the 8 Pl. R. Hil. T. 1853, a set-off must be pleaded specially (unless the plaintiff has admitted it in his particulars of demand, 13 Pl. R. Hil. T. 1853), and cannot, as formerly, be given in evidence under a *notice* of set-off (*m*). A form is given in schedule B. to the Common Law Procedure Act, 1852, "That the plaintiff at the commencement of this suit was, and still is, indebted to the defendant in an amount equal to the plaintiff's claim for [*state the cause of set-off as in a declaration*], which amount the defendant is willing to set off against the plaintiff's claim."

By 19 Pr. R. Hil. T. 1853, particulars of set-off (which must be delivered with every plea of set-off, "containing claims of a similar nature as those in which a plaintiff is required to deliver or file particulars") shall be annexed by the plaintiff's attorney to the record at the time it is entered with the proper officer.

Independently of any statute, however, there may be a set-off, and that either by express agreement, as where the master of a barge agreed with the owner, a carrier, that any loss or damage sustained by the goods conveyed in his barge should be deducted from his wages (*n*); or by implied agreement, as where by the custom of the hat trade, the injury sustained by the hats in the process of dyeing, was deducted from the charge for dyeing (*o*); so where by the usage at Lloyd's, as between insurance brokers and the underwriters, a particular loss is settled for the assured by the underwriter setting off his general balance for premiums due from the broker, against the sum due to the assured on the policy (*p*).

Semble, that set-off is a matter of procedure and therefore governed by the *lex fori* (*q*).

Replication.—The form of the replication to a plea of set-off is "that the plaintiff was not *nor is* indebted as alleged," or a joinder of issue under the 79th section of the Common Law Procedure Act, 1852, under which evidence of payment of the sum set off may be given, which it could not be under a replication of "*never indebted*" (*r*). Under a replication of *nil debet* to a plea of set-off the plaintiff may show that the debt sought to be set off is due from himself and a third party (*s*). "What the defendant (under a plea of set-off) undertakes to prove is that his cross demand in its integrity equals the plaintiff's whole claim when proved" (*t*). "In order to make the defence available, it should be equally true at the time of trial as at the time of pleading" (*u*). A replication

(*m*) *Graham v. Partridge*, 1 M. & W. 395.

(*n*) *Cleworth v. Pickford*, 7 M. & W. 314.

(*o*) *Bamford v. Harris*, 1 Stark. 343; and see *Burchell v. Salter*, 1 Q. B. 197.

(*p*) *Stewart v. Aberdeen*, 4 M. & W. 211.

(*q*) *Macfarlane v. Macfarlane*, 2 B. &

S. 783.

(*r*) *Stockbridge v. Sussams*, 3 Q. B. 239.

(*s*) *Arnold v. Bainbrigge*, 9 Exch. 153.

(*t*) *Per Alderson, B.*, in *Mead v. Bashford*, 5 Exch. 336.

(*u*) *Per Parke, B.*, in *Briscoe v. Hill*, 10 M. & W. 735.

of payment to a plea of set-off is therefore good (*v*); and *e converso* where a set-off proved was less than the plaintiff's claim at the commencement of the action, but (in consequence of payment by defendant after action) more at the time of trial, it was held that the plaintiff was still entitled to a verdict (with nominal damages) on the plea of set-off (*x*).

10. Tender.

10. *Tender*.—"The principle of a plea of tender is this, that the defendant has always been ready at all times to pay upon request, and upon a particular occasion offered the money" (*y*). To an action of simple contract the defendant may plead the general issue as to part of the plaintiff's demand, and a tender before the commencement of the suit as to the rest; but the defendant will not be permitted to plead the general issue to the whole declaration, and a tender as to part; because, if the general issue should be found for the defendant, it would then appear on the record, that nothing was due, although the defendant by his plea of tender had admitted something to be due (*z*). A tender may be pleaded to a *quantum meruit* (*a*).

What a good tender.—"A tender must be of a specific sum on a specific account, and if it be upon a condition which the creditor has a right to object to, it is not a good tender" (*b*). Thus an offer to pay a sum of money with a condition that it shall be accepted as the whole balance due, when a larger sum is claimed, does not amount to a legal tender of the sum offered to be paid (*c*). But where the words used in making the tender were, "I am come with the amount of your bill," and the plaintiff refused the money, saying, "I shall not take that—it is not my bill;" it was held, that the tender was sufficient, "for a defendant who makes a tender always means that the amount tendered, though less than the plaintiff's bill, is all he is entitled to demand in respect of it" (*d*). "The person making a tender has a right to exclude presumptions against himself by saying, 'I pay this as the whole that is due,' but if he requires the other party to accept it as all that is due, that is imposing a condition, and when the offer is so made the creditor may refuse to consider it as a tender" (*e*).

(*v*) *Eyton v. Littledale*, 4 Exch. 159.

(*x*) *Spradbery v. Gillam*, 2 L., M. & P. 366. As to the replication in set-off when part of the money attempted to be set off has been subsequently to plea paid into court by the plaintiff in a cross action by the defendant against him, see *Briscoe v. Hill*, 10 M. & W. 735.

(*y*) *Per Parke, B., Heskelth v. Fawcett*, 2 D. N. S. 829.

(*z*) *Dowgall v. Bowman*, 3 Wils. 145;

Anon., C. B. M. 40 Geo. III. MSS.; *Maclellan v. Howard*, 4 T. R. 194.

(*a*) *Johnson v. Lancaster*, Str. 576.

(*b*) *Per Maule, B., in Bevens v. Rees*, 5 M. & W. 306.

(*c*) *Evans v. Judkins*, 4 Campb. 156; *acc. Strong v. Harvey*, 3 Bingh. 304; *Forod v. Noll*, 2 D. N. S. 617.

(*d*) *Henwood v. Oliver*, 1 Q. B. 409.

(*e*) *Per Erle, J., Bowen v. Owen*, 11 Q. B. 130.

In order to sustain a plea of tender, it is not necessary in all cases to prove the actual production of money, in monies numbered; it will be sufficient to show that the defendant was in a present condition to substantiate his offer, and that the plaintiff dispensed with the production of the money; but there must be either an actual offer of the money produced, or the production of it must be dispensed with by the express declaration or equivalent act of the creditor (*f*); and whether there has been such dispensation or not is a question for the jury (*g*). "Where there is a dispute as to the amount of the demand, the plaintiff, by objecting to the quantum, may dispense with a tender of the actual or of any specific sum; there should, however, be an offer to pay by producing the money, unless the plaintiff dispenses with the tender expressly, by saying, that the defendant need not produce the money, as he would not accept it; for though the plaintiff might refuse the money at first, yet if he saw it produced, he might be induced to accept of it" (*h*).

If a man tender more than he ought to pay, it is good, for *omne majus continet in se minus*, and the other ought to accept so much of it as is due to him (*i*). Hence, a proof of a tender of 20*l.* 9*s.* 6*d.* in bank notes and silver was held sufficient to support a plea of tender of 20*l.* (*k*). "If a debtor tenders a larger sum than is due, and asks for change, this will be a good tender, if the creditor does not object to it *on that account*, but only demands a larger sum.—There is not any occasion to produce the money, if the creditor refuses to receive it on the ground of more being due" (*l*). A tender of part of an *entire* demand is inoperative, and if the demand be entire that fact may be replied to a plea of tender (*m*). Where money is refused on account of more being due, the plaintiff cannot afterwards object to the tender on the ground that a receipt was demanded (*n*). Where defendant, being indebted to the plaintiff in 3*l.* 10*s.*, produced to him a 5*l.* bank note, and desired him to take 3*l.* 10*s.* out of that, it was held that, it was not a good tender; for, "if I tender a man twenty guineas in the current coin of the realm, this may be a very good tender for fifteen, for he has only to select so much, and restore me the residue. But a tender in bank notes is quite different. In that case the tender may be made in such a way that it is physically impossible for the creditor to take what is due and restore the difference. If 3*l.* 10*s.* could be tendered by a note for 5*l.*, so it

(*f*) *Thomas v. Evans*, 10 East, 101.

(*g*) *Douglas v. Patrick*, 3 T. R. 683;
Finch v. Brook, 1 B. N. C. 253.

(*h*) *Per Kenyon*, C. J., 4 Esp. 68. See
Finch v. Brook, 1 B. N. C. 253.

(*i*) *Wade's case*, 5 Rep. 115, a; *Bevans v. Rees*, 5 M. & W. 306.

(*k*) *Dean v. James*, 4 B. & Ad. 547.

(*l*) *Per Kenyon*, C. J., in *Black v. Smith*, Peake's N. P. C. 88.

(*m*) *Dixon v. Clark*, 5 C. B. 365.

(*n*) *Richardson v. Jackson*, 8 M. & W. 298, and, *quare*, whether he could object on such a ground at all. S. C.

might by a note for 50,000*l.*" (o). But if not objected to *on that account*, such a tender would seem to be good (p).

The defendant pleaded a tender of 10*l.*; the evidence was, that the defendant, having been employed as attorney for the plaintiff, had in that character received for his use 10*l.* in part payment, and in going from home for a time, left the 10*l.* with his clerk there. Some time afterwards the plaintiff called and demanded 16*l.* 8*s.* 11*d.*, which he said he supposed Evans had received, when the clerk told him that Evans was gone from home, and had left with him 10*l.* to give to the plaintiff when he called. The plaintiff said he would not receive the 10*l.*, nor anything less than his whole demand. The clerk did not offer the 10*l.* The court were of opinion that the evidence was insufficient: Lord *Ellenborough*, C.J., observing, "It is expressly stated, that the clerk did not offer the 10*l.* He only talked about having had 10*l.* left with him to give to the plaintiff when he called, without making any offer of it, which is not a tender in law" (q).

If A., B. and C. have a joint demand on D., and C. has a separate demand on D., and D. offer A. to pay both the debts, which A. refuses, without objecting to the form of the tender on account of his being entitled only to the joint demand; D. may plead this tender in bar of an action on the joint demand; but it ought to be pleaded as a tender to A., B. and C. (r). A tender of foreign money, made current by royal proclamation, is equivalent to a tender of lawful money of England (s).

A tender of money to an agent authorized to receive payment, is a good tender to the creditor himself (t). It must be made either to the creditor himself, or to an agent authorized to give a receipt for the debt (u). A plea of tender to a special count admits the contract as laid in the declaration (x), *secus*, in the case of the *indebitatus* counts (y).

By 56 Geo. III. c. 68, ss. 11 & 12, it is declared, that gold coin, of the weight and fineness prescribed by the Mint indenture, shall be the only legal tender for payments of any sum exceeding forty shillings, and that no tender of payment in silver coin beyond that sum shall be legal. By 3 & 4 Will. IV. c. 98, s. 6 (z), a tender of Bank of England notes payable to bearer on demand is made a legal tender to the amount expressed in such notes, and is to be "taken to be valid as a tender to such amount, for all sums above five pounds, on all occasions on which any tender of money may

(o) *Per Le Blanc*, J., in *Betterbee v. Davis*, 3 Campb. 70. See also *Robinson v. Cook*, 6 Taunt. 336.

(p) *Per Buller*, J., in *Wright v. Reed*, 3 T. R. 554.

(q) *Thomas v. Evans*, 10 East, 101.

(r) *Douglas v. Patrick*, 3 T. R. 683.

(s) *Wade's case*, 5 Rep. 114, b.

(t) *Goodland v. Blewitt*, 1 Camp. 477. See also *Moffat v. Parsons*, 5 Taunt. 307.

(u) *Per Parke*, B., *Kirton v. Braithwaite*, 1 M. & W. 313.

(x) *Cox v. Brain*, 3 Taunt. 95.

(y) *Bulmer v. Horne*, 4 B. & Ad. 132.

(z) See 7 & 8 Vict. c. 32.

be legally made, so long as the Bank of England shall continue to pay on demand their said notes in legal coin,"—*provided*, that no such notes shall be a legal tender by the Bank of England, or any branch bank thereof; but the Bank are not to be required to pay at any branch bank any notes not made specially payable at such branch bank; but the Bank of England shall satisfy at the bank in London all notes of the bank or of any branch thereof.

At common law, independently of the above statute, a tender of Bank of England notes (*a*) or country bank notes is good, if the creditor only objects to the quantum and not to the quality of the tender (*b*); and so of a cheque (*c*).

By 16 & 17 Vict. c. 102, no tender of payment in money in any gold, &c., *defaced*, shall be a legal tender.

By 29 & 30 Vict. c. 65, s. 1, power is given to her Majesty to proclaim gold coins made at the colonial branch mints a legal tender in the United Kingdom and the colonies.

Where a tender of goods is alleged, it is necessary to show a delivery under such circumstances that the defendants had an opportunity of seeing that the articles delivered to them were such as they had stipulated for (*d*); unless the contract of sale is inconsistent with such a condition, as where goods are sold by auction, having been open to public inspection two days previously (*e*).

At what Time the Tender may be made.—The tender must be made before the commencement of the suit. The line being drawn at the commencement of the suit, steps taken by the plaintiff, in contemplation only of an action, will not deprive the defendant of the benefit of his tender, if such tender was made before the actual commencement of suit. Hence it is not any answer to a plea of tender before the exhibition of the plaintiff's bill (*f*), that the plaintiff had before such tender retained an attorney, and instructed him to sue out a writ (*g*) against the defendant, and that the attorney had accordingly applied for such writ, before the tender, which writ was afterwards sued out (*h*).

Where money is payable on a particular day, a tender made so late on that day that there would not be time to count the money, would (*seem*) be bad (*i*). Where goods (10 tons of oil) were, by the terms of the contract, to be delivered within 14 days, and on

(*a*) *Per Buller, J., Wright v. Reed*, 3 T. R. 554.

(*b*) *Polglass v. Oliver*, 2 C. & J. 15.

(*c*) *Jones v. Arthur*, 8 Dowl. 442.

(*d*) *Isherwood v. Whitmore*, 11 M. & W. 347.

(*e*) *Pettit v. Mitchell*, 4 M. & G. 819.

(*f*) The writ of summons is now the commencement of personal actions. See

15 & 16 Vict. c. 76; 1 & 2 Vict. c. 110, s. 2.

(*g*) A writ of process in the Queen's Bench to bring the defendant into Court; Tidd's Pr. (8th ed.) 143; abolished in effect by the Uniformity of Process Act, 2 Will. IV. c. 39.

(*h*) *Briggs v. Calverly*, 8 T. R. 629.

(*i*) *Tinkler v. Prentice*, 4 Taunt. 549.

the 14th day, at 8.30 p.m., the vendor tendered the oil to the vendee, and the jury, on a special verdict, found that the said time was by reason of its lateness an unreasonable and improper time of day for the said tender, but also that there was sufficient time before midnight for the vendor to deliver, and for the vendee to receive, examine, and weigh the oil, it was held, that such tender was sufficient; but that it would have been otherwise if by reason of the lateness of the hour the vendee had left his warehouse (*k*).

Of the Form in which a Tender must be pleaded.—Where the money is by the agreement payable immediately, the party pleading a tender must show that he was “always ready,” from the time when the cause of action accrued (*l*). Hence to an action of *indebitatus assumpsit*, where the defendant pleaded that before the action, *viz.* on such a day, he tendered a certain sum of money, and that he was always *afterwards* ready, &c.; on demurrer the plea was held bad; for *per Cur.*, “It is not enough that he was always ready since the tender; the money was due before, and the neglect of payment was a delay, a breach of contract, and a cause of action” (*m*). “Where the agreement is to pay at a certain time, tender *at that time*, ‘and always ready,’ is a good plea.” *Per Holt, C.J.*, in *Giles v. Hartis*, Salk. 622. Both the above conditions are necessary. Thus where, to an action on a bill of exchange, the defendant pleaded, that *after* the expiration of the time appointed for the payment of the bill, and before action brought, he tendered the whole money then due upon the bill, with interest, &c.; and that he always, *from the time of the tender*, had been ready, &c.; on demurrer, the plea was held bad: Lord *Ellenborough, C.J.*, observing, that in *Giles v. Hartis*, it was expressly decided, that an averment of *tout temps prist* was necessary in the plea of tender, and that it was one of those landmarks in pleading which ought not to be departed from (*n*). So (*o*) where the plea alleged that *after the bill became due*, and before suit, the defendant tendered, &c., and that he was always, *from the time the bill became due*, ready, &c., the plea was held bad (*p*); and *per Parke, B.*, “Nothing can discharge a covenant” (or contract) “to pay on a certain day but actual payment or tender *on that day*, although if the party afterwards chooses to receive the money, that may be pleaded by way of accord and satisfaction.” A plea that the defendant is ready, and has always been ready, with a *profert in curia*, but not averring a tender, will be bad on general demurrer (*q*).

(*k*) *Startup v. Macdonald (in error)*, 6 M. & G. 593.

(*l*) *Giles v. Hartis*, Ld. Raym. 254.

(*m*) *Sweatland v. Squire*, Salk. 623.

(*n*) *Hume v. Peploe*, 8 East, 168.

(*o*) *Poole v. Tunbridge*, 2 M. & W. 223.

(*p*) On special demurrer, and these are now abolished by 15 & 16 Vict. c.

76, s. 51. Although, however, such a plea might perhaps be held good on demurrer since that act, the defendant would still be bound under it to prove at the trial a tender on the day the bill became due. See *Siggers v. Lewis*, 1 C., M. & R. 370.

(*q*) *French v. Watson*, 2 Wils. 74; *acc. Haldane v. Johnson*, 8 Exch. 689.

Of the Replication.—To a plea of tender the plaintiff may reply a demand and refusal, either prior or subsequent to the tender (provided the demand be made after the cause of action accrued), for this negatives the fact that the defendant was “always” ready to pay (*r*). Under this issue, if the contract be divisible, as in an action for goods sold, work and labour, &c. (*s*), and the tender be to part, it will be incumbent on the plaintiff to prove that he demanded the precise sum tendered (*t*); but proof of a demand of a *larger* sum than that which was tendered will support the issue if the contract be entire and indivisible, (as on a promissory note (*u*),) for in such a case a tender of part is inoperative (*x*). The demand ought to be made by some person authorized to give the debtor a discharge. Hence, where the demand had been made by the clerk to the plaintiff’s attorney, who had never seen the defendant before going upon this errand, Lord *Ellenborough* held the demand insufficient; admitting, however, that the demand by the attorney himself might have done (*y*); but the fact of sending a person to make the demand, would (*seem*) imply authority to give a discharge (*z*).

V. *Damages.—Judgment.*

Where an action is brought for not delivering goods upon a given day, the true measure of damages is the difference between the price agreed for, and that which goods of a similar quality and description bore on or about the day when the goods ought to have been delivered (*a*). So in the case of non-delivery of railway shares (*b*); “for the plaintiff has the money in his own possession, and might have gone into the market and bought other shares (or goods) as soon as the contract was broken,” *per Parke*, B., S. C. So, *e converso*, in an action for not accepting and paying for goods, the proper measure of damages is the difference between the price contracted for and the market price at the time when the contract ought to have been completed (*c*), for the vendor may immediately after breach take his goods into the market and sell them. Where A. contracted for the purchase of wheat “to be delivered at B. as soon as vessels could be obtained for the carriage thereof,” and subsequently (the market having fallen) A. gave the

(*r*) *Per Parke* B., *Poole v. Tunbridge*, 2 M. & W. 226; *Rivers v. Griffiths*, 5 B. & Ald. 630.

(*s*) *Hesketh v. Fawcett*, 11 M. & W. 356.

(*t*) *Brandon v. Newington*, 3 Q. B. 915.

(*u*) *Cotton v. Godwin*, 7 M. & W. 147.

(*x*) *Dixon v. Clark*, 5 C. B. 365.

(*y*) *Coles v. Bell*, 1 Campb. 478, n.

(*z*) See *per Parke*, B., in *Kirton v. Braithwaite*, 1 M. & W. 313.

(*a*) *Gainsford v. Carroll*, 2 B. & C. 624; *Valpy v. Oakley*, 16 Q. B. 935.

(*b*) *Shaw v. Holland*, 15 M. & W. 136.

(*c*) *Boorman v. Nash*, 9 B. & C. 145.

seller notice that he would not accept it, if it were delivered (*d*), the wheat being then on its transit to B.; it was held in an action against A. for not accepting the wheat, that the proper measure of damages was the difference between the contract price and the market price on the day when the wheat was tendered to A. for acceptance at B., and refused; and not on the day when the notice was received by the seller (*e*).

But where the defendant holds in his hands the money or goods of the plaintiff, thereby preventing him from using it, the rule is different. Therefore in an action for not replacing stock, or not delivering shares lent (*f*), the highest value as it stood either when it ought to have been replaced or returned, or at the time of trial, at the option of the plaintiff, is to be taken (*g*), but not any higher price to which the stock may have risen at any intermediate time (*h*).

In an action for not accepting railway shares, it was held, that the proper measure for damages is the difference between the contract price, and the price to be obtained within a reasonable time after breach (*i*). Where by the terms of a contract goods were to be delivered at stated periods, but they were not all delivered at the respective times, the purchasers not countermanding them, but requesting from time to time that the supply might be delayed, and ultimately the purchasers refused to accept any more; it was held, that the jury were justified in taking into their calculation in assessing the damages the whole quantity which remained to be delivered; though consisting in part of quantities which, without being actually countermanded, had, by the desire of the purchasers, been kept back at the times appointed for delivery (*k*).

If there be a count on a special contract, and a common count for work, labour and materials, and the plaintiff fails to recover on the special contract, the plaintiff can recover, on the common count, only so much as the work and materials are worth (*l*); subject to a reduction for damages (other than mere consequential damages), in respect of any breach of contract on his part (*m*). In *Thornton v. Place*, however, *Park, J.*, said,—“when a party engages to do certain work on certain specified terms, and in a certain specified manner, but in fact does not perform the work so as to correspond with the specification, he is not of course entitled to recover the price agreed upon in the specification, *nor can he*

(*d*) That such an act is a breach, see *Höchst v. De la Tour*, 2 E. & B. 678; i. e., if the vendor elects to treat it as such. *Leigh v. Paterson*, 8 Taunt. 540.

(*e*) *Phillipotts v. Evans*, 5 M. & W. 475.

(*f*) *Owen v. Routh*, 14 C. B. 491. See *Tempest v. Kilner*, 3 *ibid.* 253.

(*g*) *Shepherd v. Johnson*, 2 East, 211.

(*h*) *M'Arthur v. Lord Seaforth*, 2

Taunt. 257; but see *Sedgwick on Damages* (3rd ed.), 276, *et seq.*

(*i*) *Stewart v. Cauty*, 8 M. & W. 160.

(*k*) *Cort v. Ambergate Railway Company*, 17 Q. B. 127.

(*l*) *Chappell v. Hickes*, 2 C. & M. 214.

(*m*) *Mondell v. Steel*, 8 M. & W. 858. See *Turner v. Diaper*, 2 M. & G. 241.

recover according to the actual value of the work, as if there had been no special contract. What the plaintiff is entitled to recover is the price agreed upon in the specification, subject to a deduction, and the measure of that deduction is the sum which it would take to alter the work, so as to make it correspond with the specification" (n). And this principle would seem the more correct one where it is applicable, otherwise the plaintiff might, in spite of his breach of contract, recover more under a *quantum meruit*, than he was entitled to under the special contract.

Where an agreement contains several stipulations, some of them of great importance and value to the parties and others of little or no importance, a sum agreed to be paid *generally* (o), by way of damages for the breach of any of them, shall be construed as a penalty, and not as liquidated damages, even though the parties have in express terms stated the contrary (p). But if the breaches against which the agreement is directed be all of *uncertain* amount, or the stipulated sum be confined to such breaches, the sum agreed to be paid will be considered as liquidated damages, and not as a penalty (q); for "there is nothing illegal and unreasonable in parties by their mutual agreement settling the amount of damages *uncertain* in their nature at any sum upon which they may agree" (r).

Where the contract was for *about* 300 quarters (*more or less*) of foreign rye, shipped on board a particular vessel coming from Hamburgh; the vessel brought 345 quarters, and the sellers refused to deliver any part, unless the purchasers would accept the whole: it was held, that they were not bound to accept the whole: Lord *Tenterden*, C. J., and *Littledale*, J., being of opinion, that by the words "about," and "more or less," the parties could not have contemplated so large an excess as 45 over 300 quarters; and *Parke* and *Patteson*, JJ., that it lay on the sellers to show that such an excess was contemplated; and if from the obscurity of the contract they were unable to do so, their defence failed. *Littledale*, J., said, "When land is described in conveyances, it is often mentioned as containing so many acres and roods, 'be the same more or less,' but it is always understood that the excess bears a very small proportion to the quantity named, a much smaller proportion than that of 45 to 300 quarters" (s). Where

(n) 1 M. & Rob. 218. Acc. *Robson v. Godfrey*, Holt, 236; *Ellis v. Hamlyn*, 3 Taunt. 52.

(o) *Secus* (*semble*), if the agreed sum is expressly directed to be paid upon *each* and *every* breach. *Goldsworthy v. Strutt*, 1 Exch. 659. This substantially involves the question whether for a single breach, the damage sustained by which is capable of being measured by a precise sum, a larger sum can be agreed upon as liquidated damages. There seems nothing in reason against it, but the question can-

not be considered as settled. See *Atkins v. Kinnier*, *Reynolds v. Bridge*.

(p) *Kemble v. Farren*, 6 Bingh. 141; *Jones v. Green*, 3 Y. & J. 304; *Atkins v. Kinnier*, 4 Exch. 776.

(q) *Reynolds v. Bridge*, 6 E. & B. 528.

(r) *Per Tindal*, C. J., *Kemble v. Farren*.

(s) *Cross v. Eglin*, 2 B. & Ad. 106. In this case evidence was received that the words "more or less," in a contract for grain, according to the custom of

the words were "about 500 tons," it was held that they meant 500 tons at least, and that the contract was not fulfilled by the delivery of a smaller amount (*t*).

Judgment.—Although it is a rule that the court will look to the whole record, and give judgment according to the truth there disclosed, however irregular the mode of pleading may be (*u*); yet the court cannot pick out of various parts of the record a *different cause of action* from that for which the plaintiff proceeds (*x*).

merchants, do not require a purchaser to accept so large an excess, *Littledale, J., dubitante*. Evidence was received to show that 1,000 rabbits meant 1,200 rabbits, in *Smith v. Wilson*, 3 B. & Ad. 728; that a bale of cotton meant a compressed bale, not a bag, in *Taylor v. Briggs*, 2 C. & P. 525; that a sale of pockets of hops at 100s. meant a sale at 5*l.* per cwt., though it was proved that a pocket of hops contained more, in *Spicer v. Cooper*, 1 Q. B. 424; that "Lady-day" meant "old Lady-day," in *Doe v. Benson*, 4 B. & Ald. 588; that mess-pork of Scott & Co. meant messpork manufactured by Scott & Co.,

in *Powell v. Horton*, 2 B. N. C. 668; and to explain the terms "level," "deeper than," "below," in *Clayton v. Gregson*, 5 A. & E. 302; to show the distinction between "good" and "fine" barley, in *Hutchinson v. Bowker*, 5 M. & W. 535; and to show that a "bale" of gambier meant a package of a particular description, in *Gorrissen v. Perrin*, 2 C. B. N. S. 681.

(*t*) *Bourne v. Seymour*, 24 L. J. (C. P.), 202.

(*u*) *Le Bret v. Papillon*, 4 East, 502; *Charnley v. Winstanley*, 5 East, 266.

(*x*) *Head v. Baldrey*, 6 A. & E. 469.

CHAPTER VI.

ATTORNEY.

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ATTORNIES and solicitors (a) may maintain an action of simple contract, for the recovery of their fees (b), against their client, or the solicitor or agent employing them (c). To such an action the defendant may plead the Statute of Limitations (d).

The 6 & 7 Vict. c. 73, s. 2, enacts, that "No person shall act as an attorney or solicitor, or as such attorney or solicitor sue out any writ or process, or commence, carry on, solicit or defend any action, suit or other proceeding, in the name of any other person, or in his own name, in Her Majesty's High Court of Chancery, or Courts of Queen's Bench, Common Pleas, or Exchequer"—or court of the Duchy of Lancaster and Durham—"or in the Court of Bankruptcy, or in the Court for the Relief of Insolvent Debtors, or in any county court, or in any court of civil or criminal jurisdiction, or in any other court of law or equity, in that part of the United Kingdom of Great Britain and Ireland called England and Wales, or act as an attorney or solicitor in any cause, matter or suit, civil or criminal, to be heard, tried or determined before any justice of assize, of oyer and terminer, or gaol delivery, or at any general or quarter sessions of the peace for any county, riding, division, liberty, city, borough or place, or before any justice or justices, or before any Commissioners of Her Majesty's revenue, unless such person shall have been previously to the passing of this act" (22nd Aug., 1843) "admitted and enrolled and otherwise duly qualified

(a) See R. G. H. T. 1853, regulations approved by the judges with regard to the examination of attorneys; 13 C. B. 112; and 6 & 7 Vict. c. 73, ss. 17 and 18, as to the examination of solicitors of Court of Chancery, and the orders made by the Master of the Rolls in pursuance thereof, 5 Beav. 13. As to examination before article, and generally in relation to admission, 23 & 24 Vict. c. 127. As to the admission of colonial attorneys to practise in England, see 20

& 21 Vict. c. 39. In reference to practising in Probate, Matrimonial, and Admiralty Courts, see 20 & 21 Vict. c. 77, ss. 43, 44, 45; 21 & 22 Vict. c. 108, s. 13, and 22 & 23 Vict. c. 6, s. 1. Solicitors' and Attorney's Act (Ireland), 29 & 30 Vict. c. 84.

(b) *Bradford v. Woodhouse*, Cro. Jac. 520.

(c) *Sands v. Trevilian*, Cro. Car. 194.

(d) *Oliver v. Thomas*, Ld. Raym. 2.

to act as an attorney or solicitor under or by virtue of the laws now in force, or unless such person shall after the passing of this act be admitted and enrolled and otherwise duly qualified to act as an attorney or solicitor, pursuant to the directions and regulations of this act, and unless such person shall continue to be so duly qualified and on the roll at the time of his acting in the capacity of an attorney or solicitor as aforesaid."

The above section includes two distinct disabilities: 1, want of admission and enrolment, which (*semble*) are one and the same thing; and, 2, want of due qualification; *e. g.*, if the attorney be in prison (*e*) (see section 31, *infra*). An attorney could not before this act, unless duly enrolled in the court in which the action was brought, maintain an action against his client for his fees or against the opposite party for costs, although in other respects he were duly qualified (*f*); but the admission of one partner was held to be sufficient in an action for fees brought by the partnership (*g*). An unqualified person acting as an attorney may be indicted under this section, in addition to his incapacity to recover his fees under section 35, and to his liability for a contempt of court under section 36 (*h*). If the attorney be duly admitted, &c., and qualified at the time the work was done, a subsequent disqualification will not, it seems, affect his right to recover (*i*). If a person act in a suit as attorney, who is not really so, the court will either stay the proceedings till a proper attorney be appointed (*k*), or set them aside (*l*).

By section 26, it is enacted, that—"No person who as an attorney or solicitor shall sue, prosecute, defend, or carry on, any action or suit or any proceedings in any of the courts aforesaid, without having previously obtained a stamped certificate which shall be then in force, shall be capable of maintaining any action or suit at law or in equity for the recovery of any fee, reward, or disbursement, for or in respect of any business, matter, or thing, done by him as an attorney or solicitor as aforesaid, whilst he shall have been without such certificate as last aforesaid."

The above section only disables an uncertificated attorney from suing for business done by him in some suit or proceeding *in court*, and not for business which has no reference to any suit (*m*).

By section 31—"No attorney or solicitor who shall be a prisoner in any gaol or prison, or within the limits, rules, or liberties of any gaol or prison, shall or may during his confinement in any gaol or prison, or within the limits, rules or liberties of any gaol or prison, as an attorney or solicitor, in his own name or in the name

(*e*) *Williams v. Jones*, 2 Q. B. 276.

(*f*) *Humphreys v. Harvey*, 1 B. N. C.

62.

(*g*) *Arden v. Tucker*, 4 B. & Ad. 815.

(*h*) *R. v. Buchanan*, 8 Q. B. 883.

(*i*) *Williams v. Jones*, 2 Q. B. 276.

(*k*) *Bayley v. Thompson*, 2 Dowl. 655.

(*l*) *Hawkins v. Edwards*, 4 Moo. 603.

(*m*) *Richards v. Suffield*, 2 Exch. 616.

of any other attorney or solicitor, sue out any writ or process, or commence or prosecute or defend any action or suit in any courts of law or equity or matter in bankruptcy, and such attorney or solicitor so commencing, prosecuting or defending any action or suit as aforesaid, and any attorney or solicitor permitting or empowering any such attorney or solicitor as aforesaid to commence, prosecute or defend any action or suit in his name, shall be deemed to be guilty of a contempt of the court in which any such action or suit shall have been commenced or prosecuted, and punishable by the said courts accordingly, upon the application of any person complaining thereof; and such attorney or solicitor so commencing, prosecuting or defending any action or suit as aforesaid, shall be incapable of maintaining any action or suit at law or in equity for the recovery of any fee, reward or disbursement for or in respect of any business, matter or thing done by him whilst such prisoner as aforesaid in his own name or in the name of any other attorney or solicitor."

The above section does not, it seems, apply to an attorney in prison suing as plaintiff (*n*); nor to cases where the attorney is imprisoned subsequently to the commencement of the suit, and only *continued* the suit while in prison (*o*). An attorney who had been imprisoned subsequently to the commencement of the suit, and while in prison continued the proceedings and brought them to a successful issue, was held entitled to recover, his client having been in constant communication with him (*p*). But where the imprisonment prevents this, it seems the attorney cannot recover at common law, and independently of the above section, for the client is entitled to the benefit of the attorney's judgment and assistance (*q*).

By section 35—"In case any person shall in his own name, or in the name of any other person, sue out any writ or process, or commence, prosecute or defend any action or suit, or any proceedings in any court of law or equity, without being admitted and enrolled as aforesaid, or being himself the plaintiff or defendant in such proceedings respectively, every such person shall be and is hereby made incapable to maintain or prosecute any action or suit in any court of law or equity, for any fee, reward or disbursements on account of prosecuting, carrying on or defending any such action, suit or proceeding, or otherwise in relation thereto, and such offence shall be deemed a contempt of the court in which such action, suit, or proceeding shall have been prosecuted, carried on, or defended, and shall and may be punished accordingly."

The above section would not, it seems, apply to an attorney practising without a certificate (*ante*, p. 196) if duly admitted and

(*n*) *Kaye v. Denew*, 7 T. R. 671.

(*o*) *Longmore v. Rogers*, Willes, 288, n.

(*p*) *Noel v. Hart*, 8 C. & P. 230.

(*q*) *Hopkinson v. Smith*, 1 Bingham 13.

enrolled (*r*); nor to a country attorney conducting a suit through his town agent (*s*). And it has been decided that the section does not include the case of an attorney transacting business in a court in which he is not admitted, by an agent who is (*t*).

The 91st section of the 9 & 10 Vict. c. 95, enacts, that "No person not being an attorney admitted to one of her Majesty's superior courts of record shall be entitled to have or recover any sum of money for appearing or acting on behalf of any other person in the said court, and no attorney shall be entitled to have or recover *therefore* any sum of money unless the debt or damage claimed shall be more than 40s., or to have or recover more than 10s. for his fees and costs, unless the debt or damage claimed shall be more than 5*l.*, or more than 15*s.* in any case within the summary jurisdiction given by this act, &c."—The word "therefore," in the above section, applies only to the preceding words "for *appearing* or *acting* on behalf of any other person in the said court;" the section, therefore, does not prevent an attorney from recovering from his client remuneration beyond the amounts therein mentioned, for services rendered by him out of court in respect of the subject-matter of the plaint, and before its commencement (*y*). But now, by the 18 & 19 Vict. c. 108, s. 36, an attorney cannot, in suits where the claim is within 20*l.*, recover any further costs than those mentioned above, unless upon taxation of costs the registrar be satisfied by writing under the hand of the client that he has agreed to pay further costs or charges, and in such case the registrar may allow any costs or charges not exceeding the amount which may have been so agreed to be paid.

By s. 37 of the 6 & 7 Vict. c. 73—"No attorney or solicitor, nor any executor, administrator or assignee of any attorney or solicitor (*z*), shall commence or maintain any action or suit for the recovery of any fees, charges or disbursements for any business done by such attorney or solicitor, until the expiration of one month after such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, shall have delivered unto the party to be charged therewith, or sent by the post to or left for him at his counting-house, office of business, dwelling-house, or last known place of abode, a bill of such fees, charges and disbursements, and which bill shall either be subscribed with the proper hand of such attorney or solicitor (or, in the case of a partnership, by any of the partners, either with his own name, or with

(*r*) *Hodgkinson v. Mayer*, 6 A. & E. 194.

(*s*) *Jones v. Jones*, 5 Dowl. 474.

(*t*) *Hulls v. Lea*, 10 Q. B. 940. And see *Humphreys v. Harvey*, 1 B. N. C. 62.

(*y*) *Keighley v. Goodman*, 1 L., M. & P. 204. See *Clutterbuck v. Hulls*, 15 L.

J. (Q. B.) 310.

(*z*) Previous to this act it was not necessary for an executor (*Williams v. Griffith*, 10 M. & W. 125), or an assignee of an attorney (*Lester v. Lazarus*, 2 C., M. & R. 665), to deliver a bill before action.

the name or style of such partnership (a), or of the executor, administrator, or assignee of such attorney or solicitor, or be enclosed in or accompanied by a letter subscribed in like manner referring to such bill," &c.

This act, so far as it relates to the delivery and taxation of an attorney's bill, ought to be construed liberally for the client, and strictly for the attorney, for the latter knows the law and the former does not (b). The act is retrospective in its operation, and applies to bills outstanding on the passing of the act, 22nd August, 1843, of which, therefore, a bill must be delivered in accordance with the above section (c). It extends only to actions for fees, &c.; an attorney, therefore, may bring an action on a promissory note given on account of his fees, &c., without delivering any signed bill, even although such note includes future disbursements (d). But if at the trial he fails on the count for work and labour, because no signed bill has been delivered, he cannot resort to the count on an account stated to recover, although he prove that his charges were assented to by the client, the plea of "no signed bill" being pleaded to both counts (e).

No delivery is necessary to enable an attorney to *set off* his bill (f); but he should in such a case deliver his bill in time to get it taxed before trial (g). Where the defendant under a plea of set-off to an action on an attorney's bill put in an account rendered to him by the plaintiff, by which the plaintiff credited him with certain sums on the one hand, and on the other side of the account debited the defendant with his bill of costs, for which no signed bill had been delivered, leaving, however, on the whole account a balance due to the plaintiff, it was held that the plaintiff might avail himself of the bill of costs contained in the account, to defeat the defendant's plea of set-off, "for the neglect to deliver such a bill merely prevents an attorney from recovering the amount by action, but does not bar the debt" (h). The "month" is by the interpretation clause, s. 48, a calendar month (i), and in the computation of the time the days on which the bill was delivered, and on which the writ was issued, are to be excluded (k).

Money paid by an attorney for costs which his client is adjudged to pay is a "disbursement" (l); but not money paid "by the

* (a) This was so previously. *Owen v. Scales*, 10 M. & W. 657.

(b) *Per Alderson, B., Engleheart v. Moore*, 15 M. & W. 548.

(c) *Scadding v. Eyles*, 9 Q. B. 858.

(d) *Jeffreys v. Evans*, 3 D. & L. 52.

(e) *Brooks v. Brockett*, 9 Q. B. 847.

(f) *Martin v. Winder*, Dougl. 199, n.; *Brown v. Tibbitts*, 11 C. B. 855 (N. S.); or to prove it under a commis-

sion of bankruptcy. *Eicke v. Nokes*, M. & M. 303.

(g) *Martin v. Winder*, and see *Bulman v. Birkett*, 1 Esp. 449.

(h) *Harrison v. Turner*, 10 Q. B. 482.

(i) See *Parker v. Gill*, 5 D. & L. 21.

(k) *Blunt v. Haslop*, 9 Dowl. 982; *Ex parte Ley*, 13 L. T. 262.

(l) *Crowder v. Shee*, 1 Campb. 436; but see *Sparrow v. Johns*, 6 Dowl. 554.

client to the attorney to make some specific payment over the amount of which the attorney was to have no discretion, and merely acted as a conduit pipe.—If the client's money come generally to the hands of the attorney without any specific direction as to the mode of applying it, and he use it for the client's purposes, although the proportions in which he shall use it are not determined by his discretion, such use must constitute a disbursement within the meaning of the act of parliament" (*m*). So a charge for attending at a lock-up house, and obtaining defendant's release and filling up the bail bond, is a disbursement (*n*). But money lent is not (*o*); nor money paid by an attorney in consequence of his undertaking to pay the debt and costs in an action in which he is not concerned (*p*).

The above section says, "for *any* business done by such attorney or solicitor."—"This does not mean for every description of business which a person, *being* an attorney or solicitor, does for another, but for such professional business as he is employed to do *as* an attorney or solicitor, that is, by reason of his character as an attorney or solicitor (*q*). Hence the fees, &c., of the steward of a manor, a solicitor, are not taxable (*r*). So a clerk to commissioners, who is an attorney, and who is paid by a fiscal salary, need not deliver a signed bill of costs for business done by him as such clerk (*s*); but the bill of one solicitor against another for agency business is taxable (*t*); such a bill, therefore, must now, it seems, be delivered in accordance with the above section; though this was not necessary previously (*u*).

The bill must be delivered to the party chargeable, *i. e.* to him personally or to a person who may be considered as his agent to receive (*x*). A delivery at the dwelling-house of the defendant, to his servant, is evidence for the jury of a delivery to the defendant (*y*). So where the plaintiff delivered his bill to the solicitor of a railway company provisionally registered, and proved that the bill was subsequently in the hands of the defendant, a member of the provisional committee, who looked it over and said he had seen that bill before, that the charges were high, but that it was not intended to dispute them, and subsequently added that inquiry should be made of the solicitor as to the state of the funds, and an answer sent; it was held, that there was evidence to go to the jury of a delivery to the defendant himself (*z*). But the delivery to the solicitor of

(*m*) *Per Coleridge, J., Harrison v. Ward*, 4 Dowl. 39.

(*n*) *Fearne v. Wilson*, 6 B. & C. 86.

(*o*) *Hemming v. Wilton*, 4 C. & P. 318.

(*p*) *Prothero v. Thomas*, 6 Taunt. 196.

(*q*) *Per Cur.*, *Smith v. Dimes*, 4 Exch.

32, (*r*) *Allen v. Aldridge*, 5 Beav. 405.

(*s*) *Bush v. Martin*, 2 H. & C. 311; 33 L. J. 17 Ex.

(*t*) *Smith v. Dimes*, 4 Ex. 32, 19 L. J. 60, Ex. But see *Re Simons*, 3 D. & L. 156.

(*u*) *Hill v. Sydney*, 7 A. & E. 956.

(*x*) *Per Bayley, J., Vincent v. Slaymaker*, 12 East, 372.

(*y*) *M'Gregor v. Keily*, 18 L. J., Exch. 391.

(*z*) *Phipps v. Daubney (in error)*, 16 Q. B. 514.

the party to be charged, without showing anything further, has been held not to be a sufficient delivery (a), although, under the old act, where the words were the same, in an action against the executors of a client, a delivery to the client in his lifetime would seem to have been sufficient (b); and, where a party in a cause having changed his attorney in the progress of it, a judge's order was afterwards obtained by the second attorney for the delivery to *him* of a bill signed by the first attorney, which delivery was accordingly made: this was held to be a sufficient delivery to enable the first attorney to bring an action against the client for the amount of such bill (c).

To constitute a delivery, the bill must be *left* with the party charged; for in a case where the plaintiff had delivered his bill to the defendant in due time, who acknowledged his debt, and said that he would pay it, but that he did not know what to do with the bill, upon which the plaintiff took it back again, it was held, that the bill ought to have been left with the defendant: for the intention of the statute was, that the client should have due time to examine the charges made by the attorney, and take advice upon them, if necessary (d). In like manner it has been held, that although an attorney shows his client a copy of his bill, explaining the different charges to him, in the reasonableness of which the client acquiesces, the attorney is notwithstanding bound to leave a copy of the bill with him (e).

Where several are jointly liable to an attorney for business done, the delivery of a copy of a bill to one of them, from whom the attorney has received his instructions, is sufficient (f). But where in an action against a provisional committee-man, the bill was delivered to another member of the committee, at *his* place of business, it was held, that no sufficient delivery had been made to charge the defendant; that the ordinary rule with reference to a delivery to one of two partners or joint contractors could not be held to apply to such a case as this, and that the bill should have been delivered either at the place of business of the company, or to some person who might reasonably be supposed to represent the provisional committee (g).

It must be delivered to the party "to be charged therewith," and the bill or letter accompanying the bill must not leave this in doubt. Where, therefore, an attorney had transacted some business for the defendant's niece, a Mrs. H., while staying in the defendant's house, and subsequently to her departure therefrom sent in his bill

(a) *Re Abbott*, 4 L. T. 676, Ch.

(b) *Reynolds v. Caswell*, 4 Taunt. 193, per Mansfield, C. J.

(c) *Vincent v. Slaymaker*, 12 East, 372.

(d) *Brooks v. Mason*, 1 H. Bl. 290.

(e) *Crowder v. Shee*, 1 Campb. 437.

(f) *Finchett v. How*, 2 Campb. 277.

(g) *Edwards v. Lawless*, 5 Rail. Ca. 357; and see *Egginton v. Cumberledge*, 1 Exch. 271. See *Tate v. Hitchins*, 7 C. B. 875.

to the defendant, headed—"In the matter of Mr. and Mrs. H., Mr. G.'s" (the attorney's) "costs and charges"—and enclosed in the following letter, addressed to the defendant:—"As I understand Mrs. H. is no longer residing under your care, and presuming, therefore, that you may not be remaining longer in town, I beg to hand you my account, in the hope that it will be found satisfactory," &c.; it was held, that this was not a delivery to the party "to be charged," for that it was uncertain who really was meant to be charged, and whether the delivery was meant to charge the defendant, or whether it was merely delivered to him as the friend of the real client, Mrs. H. (*h*). Where, however, in an action against a provisional committee-man, a bill was sent in headed "Northampton, Lincoln, and Hull Railway, to R. H. D. (the attorney) debtor;" it was held, that such a heading was sufficient to charge all the persons who were responsible on the part of the railway company, including, therefore, the defendant (*i*). It is sufficient if the party to be charged can be collected from the bill and letter accompanying taken together (*k*).

"Or sent by post."—Where the letter in which the bill was enclosed, was placed by the plaintiff's clerk in a box in the office, and the clerk proved that the postman invariably called every day and took the letters out of that box, it was held, that there was evidence for the jury of a sending by post within the above words (*l*). "Or left, &c. at his counting-house, office of business, dwelling-house, or last known place of abode." A person who had no place of business of his own, directed communications to be addressed and sent to him at his attorney's office, where he occasionally called and wrote letters. An attorney's bill of costs was addressed to and left there for him more than a month before action brought, but he did not actually receive it till a fortnight before action, it was held that there was evidence for the jury to find that there was a proper delivery (*m*).—The provisional committee of a railway company, amongst whom was the defendant, took offices in Moorgate Street, London, and put up a brass plate with the name of the company engraved on it. In January, 1846, the scheme was abandoned, and the defendant never afterwards attended at the office in Moorgate Street, or interfered in the affairs of the company. A sub-committee was however appointed, for the purpose of ascertaining and settling the claims on the committee-men, and the brass plate continued on the door in Moorgate Street. In September, 1846, the plaintiff delivered his bill at the office in Moorgate Street, to a person there who seemed to be a clerk, addressed to "The Provisional Committee of the Company." The Court of Common Pleas were equally divided as to whether there was a

(*h*) *Gridley v. Austin*, 16 Q. B. 504.

(*i*) *Phipps v. Daubney (in error)*, 16 Q. B. 514.

(*k*) *Taylor v. Hodgson*, 3 D. & L. 115.

(*l*) *Skilbeck v. Garbett*, 7 Q. B. 846.

(*m*) *Spier v. Bernard*, 8 L. T. 396, Ex.

sufficient delivery at the defendant's "office of business," within the meaning of the act (*n*). The defendant may show, that at the time of the delivery of the bill, the place at which it was delivered was not his last known place of abode (*o*).

The plea that no signed bill was delivered, must be pleaded specially, and cannot be given in evidence under the general issue (*p*). The "month" mentioned is, by the interpretation clause, s. 48, a calendar month, and should be so pleaded (*q*). The plea should negative any sending by post (*r*). In a separate plea by one of two partners or joint contractors, it is not necessary to allege that no signed bill was delivered to *either* of them; it is sufficient to state in the words of the statute, that no signed bill had been delivered to the defendant, or left, &c. at *his* counting-house, and on that issue, if the delivery to one defendant enured as a delivery in law to the other, the verdict would be for the plaintiff, otherwise for the defendant (*s*).

By the same section (the 37th), the court or a judge are, "upon the application of the party chargeable with such bill within such month," *required* to refer it to the proper officer for taxation, "and the court or judge making such reference shall restrain such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, from commencing any action or suit touching such demand pending such reference" (*t*). If no application be made by the party chargeable within such month, then *it shall be lawful* to make such reference on the application of the attorney himself, his executor, administrator or assignee, or of the party chargeable "with such directions, and subject to such conditions as the court or judge making such reference shall think proper; and such court or judge may restrain such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, from commencing or prosecuting any action or suit touching such demand pending such reference, upon such terms as shall be thought proper: *provided always*, that no such reference as aforesaid shall be directed upon an application made by the party chargeable with such bill after a verdict shall have been obtained, or a writ of inquiry executed in any action for the recovery of the demand of such attorney or solicitor, or executor, administrator or assignee of such attorney or solicitor, or after the expiration of twelve months after such bill shall have been delivered, sent or left as aforesaid,

(*n*) *Blandy v. De Burgh*, 6 C. B. 623.

(*o*) *Wadeson v. Smith*, 1 Sta. 324.

(*p*) *Robinson v. Roland*, 6 Dowl. 271.

(*q*) *Parker v. Gill*, 5 D. & L. 21.

(*r*) *Flower v. Newton*, 11 Jur. 875.

(*s*) *Tate v. Hitchins*, 7 C. B. 875.

(*t*) Where, more than a sixth having been taken off on taxation, the defendant

presented a petition to the Vice-Chancellor to allow the costs of taxation, and pending this proceeding the attorney brought an action for the residue of the bill, it was held that the action was well brought, and that the above provision did not apply. *Hewitt v. Bellott*, 2 B. & Ald. 745.

except under special circumstances (*u*), to be proved to the satisfaction of the court or judge to whom the application for such reference shall be made, &c." (*x*).

Provided also, "that it shall not in any case be necessary in the first instance for such attorney or solicitor, or the executor, administrator or assignee of such attorney or solicitor, in proving a compliance with this act, to prove the contents of the bill he may have delivered, sent or left, but it shall be sufficient to prove that a bill of fees, charges or disbursements, subscribed in the manner aforesaid, or enclosed in or accompanied by such letter as aforesaid, was delivered, sent or left, in manner aforesaid; but nevertheless it shall be competent for the other party to show that the bill so delivered, sent or left, was not such a bill as constituted a *bonâ fide* compliance with this act. *Provided also*, that it shall be lawful for any judge of the superior courts of law or equity to authorize an attorney or solicitor to commence an action or suit for the recovery of his fees, charges or disbursements against the party chargeable therewith, although one month shall not have expired from the delivery of a bill as aforesaid, on proof to the satisfaction of the said judge that there is probable cause for believing that such party is about to quit England."

An attorney's bill, generally speaking, ought to give a history of the suit, so as to enable the officer to judge of the propriety of the various items of which it is composed (*y*); and although the statute does not in terms require the name of the court and cause (if the business be done in court) to be stated, the courts have held that to give due effect to the above section, such information is necessary (*z*). It will, however, be sufficient if it can be collected by reasonable intendment, and it is not necessary to specify the particular common law court in which the business was done, the scale of taxation being now uniform in all (*a*). The delivery of a bill in which a gross sum is stated to be charged as per agreement, without giving the specific items, so as to enable the master to tax, is not the delivery of a bill within s. 37 (*b*). A bill containing amongst other items (for which the jury found the defendant liable) extra costs, but omitting the taxed costs, was held by the Court of Exchequer bad, even although the jury found that the plaintiff had no claim for extra costs on the ground that a bill which is bad in part is bad altogether (*c*), but the Court of Queen's Bench (*d*),

(*u*) See *Binns v. Hey*, 13 L. J., Q. B. 28; 1 D. & L. 661. Overcharges constitute "special circumstances." *Re Hook*, 3 Giff. 372. So also large and unusual charges requiring explanation to justify them. *Re Robinson*, 3 L. R. Ex. 4.

(*x*) See *per Lord Langdale*, M. R., *Re Downes*, 5 Beav. 428.

(*y*) *Waller v. Lacy*, 1 M. & G. 54.

(*z*) *Martindale v. Falkner*, 2 C. B.

706.

(*a*) *Cook v. Gillard*, 1 E. & B. 26; *Cozens v. Graham*, 16 Jur. C. P. 952; but see *Ivimey v. Marks*, 15 M. & W. 548.

(*b*) *Philby v. Hazle*, 29 L. J. 370, C. P.; 8 C. B. (N. S.) 647.

(*c*) *Pigott v. Cadman*, 1 H. & N. 837; but see *Haigh v. Ousey*, 7 E. & B. 578.

(*d*) *Haigh v. Ousey*, 7 E. & B. 578;

adopting the views of the Common Pleas (*e*), has dissented from the doctrine, and held that if the bill consists of several items, all within the statute, with regard to some of which the provisions of the statute have been complied with, and with regard to others, not, the items as to which the statute has been complied with may be recovered. The bill may contain usual and intelligible abbreviations (*f*), and mistakes in dates, &c., not calculated to mislead, will not vitiate it (*g*).

The bill having been delivered a month before the commencement of the action, and the party charged not having made any application to have it taxed during that interval, he will not be permitted to question the reasonableness of the items before a jury (*h*); although particular heads or items of charge may be disallowed *in toto*, as not being authorised (*i*). Delivery of the bill is conclusive evidence against an increase of charge in a subsequent bill of any of the items contained in it, and strong presumptive evidence against any additional items (*k*).

By s. 43—"The certificate of the officer by whom such bill shall be taxed shall (unless set aside or altered by order, decree, or rule of court) be final and conclusive as to the amount thereof, and payment of the amount certified to be due and directed to be paid, may be enforced according to the course of the court in which such reference shall be made; and in case such reference shall be made in any court of common law, it shall be lawful for such court, or any judge thereof, to order judgment to be entered up for such amount, with costs, unless the retainer shall be disputed, or to make such other order thereon as such court or judge shall deem proper."

If the client has paid the attorney more than is afterwards allowed on taxation, he cannot recover the surplus by action against the attorney, or set it off (*l*). His remedy is, it seems, by an application to the court (*m*). A judge's order under this section has the same effect as a rule of court for the payment of money under 1 & 2 Vict. c. 110, s. 18; if, therefore, an action be brought on this order, the costs of the writ, &c., will not be allowed (*n*).

An attorney, who has several demands against his client, some of which are barred by the Statute of Limitations, cannot appropriate, in payment of the demand so barred, a sum received by

quære, whether in such a case an attorney can split his demand, and deliver several bills; *Pigott v. Cadman*, 4 Ex. 32, 19 L. J. Ex. 60, 1 H. & N. 837.

(*e*) *Waller v. Lacy*, 1 M. & G. 54.

(*f*) *Reynolds v. Caswell*, 4 Taunt. 193.

(*g*) *Williams v. Barber*, 4 Taunt. 805.

(*h*) *Williams v. Frith*, Dougl. 198.

(*i*) *Dunn v. Hales*, 1 Fost. & Finl. 174.

(*k*) *Loveridge v. Botham*, 1 B. & P. 49. See *Ex parte Hemming*, 28 L. T., C. P. 144.

(*l*) *Phillips v. Broadley*, 16 L. J., Q. B. 72.

(*m*) *Tower v. Popkins*, 2 Sta. 85, per Lord Ellenborough, C. J.

(*n*) *Griffiths v. Hughes*, 16 M. & W. 809.

him on account of his client for damages recovered in an action (o). Where, after action brought, the bill is referred to taxation at the request of the defendant, the attorney should make it a condition of the taxation, that the defendant should allow the master to tax interest also, if the attorney wishes to avail himself of a previous notice of a claim of interest, under 3 & 4 Will. IV. c. 42, s. 28 (p).

By the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), s. 7, "Every attorney whose name shall be indorsed on any writ issued by authority of this act, shall, on demand in writing, made by or on behalf of any defendant, declare forthwith, whether such writ has been issued by him, or with his authority or privity; and if he shall answer in the affirmative, then he shall also, in case the court or a judge shall so order and direct, declare in writing, within a time to be allowed by such court or judge, the profession, occupation or quality, and place of abode of the plaintiff (q), on pain of being guilty of a contempt of the court from which such writ shall appear to have been issued (r), and if such attorney shall declare that the writ was not issued by him, or with his authority or privity, all proceedings upon the same shall be stayed, and no further proceedings shall be taken thereupon, without leave of the court or a judge" (s).

It is clearly established that negligence cannot be set up as a defence to an action on an attorney's bill: for the plaintiff does not come prepared to prove anything more than the business done, and is not in a situation to meet a charge of negligence (t). "I do not go to the length of saying that in no case can negligence in the party suing be used as a defence to the action, though I think it can only be used where the negligence has been such, that the party for whom the business was done has thereby lost all possibility of benefit from such business;" *per Sir J. Mansfield, C. J., S. C.* "No principle of law is more clearly established than this, that a party cannot enforce a charge for doing business which is useless to his employer;" *per Tindal, C. J. (u)*. If, therefore,

(o) *Waller v. Lacy*, 1 M. & G. 54.

(p) *Berrington v. Phillips*, 1 M. & W. 48.

(q) A mere temporary residence, as at a coffee house, is not sufficient. *Hodgson v. Gamble*, 3 Dowl. 174.

(r) A false statement would be equally a contempt. *Smith v. Bond*, 11 M. & W. 326.

(s) This is substantially a re-enactment of 2 Will. IV. c. 39, s. 17.

(t) *Templar v. M'Lachlan*, 2 N. R. 136.

(u) *Shaw v. Arden*, 9 Bing. 290. In this respect the rule with regard to actions by attorneys and ordinary actions for work and labour, &c., is the

same. There is, however, this difference, that an attorney's claim is not liable to be reduced *pro tanto* in consequence of negligence on his part, by which the work done is rendered *partly* useless; *Shaw v. Arden*, *per Parke, B.*; *Mondell v. Steel*, 8 M. & W. 871. (See *Cox v. Leach*, *post.*)

The rule with regard to other actions was thus laid down by Lord Ellenborough, C. J., in *Farnsworth v. Garrard*, 1 Campb. 38, which was an action on a builder's bill. "The late Mr. Justice Buller thought (and I, in deference to so great an authority, have at times ruled the same way), that in cases of this kind, a cross action for the negligence was

the business, which the attorney undertakes, wholly fails from his gross ignorance or negligence; as where an attorney was employed to prosecute an appeal at the quarter sessions, and, owing to his gross ignorance, the case was so conducted that the sessions refused to hear the appeal; it was held, that the attorney could not recover (x). So where an attorney commenced actions in the Lord Mayor's Court, whence he knew that a commission to examine witnesses abroad could not issue without great expense, and from the nature of the actions—against underwriters for particular average loss on a policy of goods which had been shipped to and sold at Calcutta—that he could not go to trial without one; and the actions were in consequence discontinued (y). But an attorney may recover, although there has been error in the execution of his duty; if the error be such as a cautious man might fall into (z).

Entire items for useless work may be discarded by a jury (a); but in the case of an entire item for work partly useful, the jury are precluded from reducing that item, in an action to recover the amount of the bill, and the client must resort to a cross action (b).

necessary; but that, if the work be done, the plaintiff must recover for it. I have since had a conference with the judges on the subject; and I now consider this as the correct rule (see *Denew v. Daverell*, 3 Campb. 451; *Duncan v. Blundell*, 3 Sta. 6), that if there has been no beneficial service, there shall be no pay; but if some benefit has been derived, though not to the extent expected, this shall go to the amount of the plaintiff's demand, leaving the defendant to his action for negligence. The claim shall be co-extensive with the benefit." See further on this subject, *Fisher v. Samuda*, 11 Campb. 190, where Lord *Ellenborough* expressed an opinion, that where an action has been brought for the value of goods furnished at a stipulated price, and the purchaser does not, either in bar of the action, or to reduce the damages, object to the quality of the goods, but allows the seller to recover a verdict for the full price agreed upon, he cannot afterwards maintain a cross action, on the ground of the goods being of a bad quality, and unfit for the purpose for which they were ordered; and this opinion was fully confirmed by the Court of Exchequer in *Mondell v. Steele*, with this distinction, that the purchaser may still sue for any consequential damages caused by the breach of contract, which he could not have given in evidence in reduction of damages in the former action for the price.

There is a distinction, however, in this respect, between a contract and a security;

for in an action on a bill of exchange, a partial failure of consideration is no defence; as where a bill had been accepted for the price of some hams, which turned out so bad that they were almost unmarketable; this was held to be no defence, but the defendant must seek his remedy by a cross action; *Morgan v. Richardson*, 1 Campb. 40, n.; *Tye v. Gwynne*, 2 Campb. 346; *Wells v. Hopkins*, 5 M. & W. 8, 9. See also *Obbard v. Betham*, 1 M. & M. 483; *Mann v. Lent*, 10 B. & C. 377. In *Morgan v. Richardson*, money had been paid into court, but Lord *Ellenborough* said, that that circumstance formed no ingredient in the opinion he then expressed. A. and B. entered into an agreement for the sale of the lease of a house; B. was let into possession, and accepted a bill for the purchase-money; in an action brought by A. against B. for non-payment of the bill, it was held, that B. could not defend the action by proving that A. had refused to execute an assignment of the lease, he having actually occupied the premises for some time, but that B. must bring a cross action, or go into equity for a specific performance. *Moggridge v. Jones*, 3 Campb. 38.

(x) *Huntley v. Bulwer*, 6 B. N. C. 111.

(y) *Cox v. Leech*, 1 C. B., N. S. 617.

(z) *Montrion v. Jefferys*, 2 C. & P. 113.

(a) *Hill v. Featherstonhaugh*, 7 Bingh. 569.

(b) *Shaw v. Arden*, 9 Bingh. 287.

The work becomes useless through the plaintiff's fault, if, in consequence of his misconduct at some particular point, the whole is made ineffectual (*c*). But in *Cox v. Leech*, it was held that the plaintiff might recover for letters written by him to the underwriters before commencing the proceedings in the Lord Mayor's Court, although by his subsequent negligence the whole proceedings were rendered nugatory. Such failure of the work is admissible in evidence under the general issue (*d*).

Where a debt is paid before action brought, the plaintiff cannot recover the costs of his attorney's application (*e*). An attorney who has attended on a subpoena, as a witness in a civil suit, cannot maintain an action against the party who subpoenaed him, for compensation for loss of time; for it is a duty imposed on all persons to attend on a subpoena, and a promise to pay money for the performance of a duty is a promise without consideration (*f*). An attorney is not, in the absence of an express contract, and of circumstances from which a special contract may be inferred, personally liable to a witness, whom he subpoenas for his expenses of attendance (*g*). But he is to a bailiff whom he employs to issue execution for his fees (*h*). The solicitor under a commission of bankruptcy is not liable in the first instance to the messenger, whom he nominates, for his bill of fees; but if the solicitor agree with the petitioning creditor to work a commission for a sum certain, and receive a great part of that sum, he will be liable to such messenger (*i*).

An attorney who has commenced an action for his client has a right to refuse to go on without an advance of money on account, provided he gives his client reasonable notice of his intention (*k*). The contract of an attorney or solicitor retained to conduct or defend a suit is entire and continuing, *viz.* to carry it on to its termination, and can only be determined by the attorney upon reasonable notice (*l*); till which time the Statute of Limitations does not begin to run, although more than six years have elapsed since the last step in the cause (*m*). But this rule does not, it seems, extend to other business upon which an attorney is employed. Therefore, where an attorney was employed by his client in procuring money to pay off a mortgage, and, after several ineffectual attempts to procure the money, some of which were *more* than six years before suit, and others *within* six years, it was ultimately obtained; it was held, that such employment was not continuous, and that the attorney could not recover for the items which were trans-

(*c*) *Per* Lord Denman, C. J., in *Bracey v. Carter*, 12 A. & E. 376.

(*d*) *Bracey v. Carter*, *supra*.

(*e*) *Caine v. Coulson*, 32 L. J. 97, Ex.

(*f*) *Collins v. Godefroy*, 1 B. & Ad. 950.

(*g*) *Robins v. Bridge*, 3 M. & W. 114.

(*h*) *Maile v. Mann*, 2 Exch. 608.

(*i*) *Hartop v. Jukes*, 2 M. & S. 438.

(*k*) *Lawrence v. Potts*, 6 C. & P. 428; *Wadsworth v. Marshall*, 2 C. & J. 665.

(*l*) *Harris v. Osbourn*, 2 C. & M. 629.

(*m*) *Whitehead v. Lord*, 7 Exch. 691.

acted beyond the six years (*n*). An attorney, however, is not compelled to proceed to the end of a suit, in order to be entitled to his costs, but may, for satisfactory cause and upon reasonable notice (which it lies on him to show (*o*)), abandon the conduct of the suit, and in such case may recover his costs for the period during which he was employed (*p*). So if the client repudiates his retainer (*q*).

The attorney of a defendant has no such interest in the suit as to prevent the parties from compromising it without his consent (*r*). The lien of an attorney on a judgment is merely a claim to the equitable interference of the court, to have the judgment held as a security for his costs, but he has no authority over the execution of a writ of *ca. sa.*, so as to carry it into effect against the order of the plaintiff, even though the plaintiff and defendant should collude to deprive him of his lien (*s*). The retainer of an attorney is determined by the death of the client (*t*).

Liability of Attornies.—An action on the case may be maintained by a client against his attorney for negligence or unskilfulness in the discharge of his professional duty. As where an attorney neglected to charge a defendant (a prisoner) in execution within the time allowed by the practice of the court, by reason of which neglect the defendant was discharged; it was held, that the action was maintainable against the attorney for negligence, but that as it sounded in damages, it was competent to the jury to find what damages they thought fit, and that they were not constrained to find the amount of the whole debt, in a case where it appeared that the debtor was not totally insolvent, and that the creditor might probably in time obtain some part of his debt by execution against his goods (*u*). A., a complainant in Chancery, employed B. as his solicitor, during whose employment an irregular order to dismiss the bill on a certain day, unless publication passed, was obtained; before that day arrived, C. was appointed the solicitor of A., and the bill having been dismissed because no step was taken by C., it was held that an action would lie against C. for negligence, because he should have conformed to the order, or should within the time have moved to vacate it (*x*).

So where the attorney in a case stated for the opinion of counsel took upon himself to draw conclusions from certain important deeds, which he accordingly *omitted* to lay before counsel (*y*).

(*n*) *Phillips v. Broadley*, 9 Q. B. 744.

(*o*) *Wilson v. Nicholls*, 11 M. & W.

106. (*p*) *Vansandau v. Browne*, 9 Bingh.

402. (*q*) *Hawkes v. Cottrell*, 27 L. J., Exch.

369. (*r*) *Quested v. Callis*, 10 M. & W. 18.

(*s*) *Barker v. St. Quintin*, 12 M. & W.

441.

(*t*) *Whitehead v. Lord*, *supra*.

(*u*) *Russell v. Palmer*, 2 Wils. 325.

See *Pitt v. Yalden*, 4 Burr. 2060.

(*x*) *Frankland v. Cole*, 2 C. & J. 590.

(*y*) *Ireson v. Pearman*, 3 B. & C. 799.

See *per Tindal, C. J., Godefroy v. Dalton*, 6 Bingh. 469; *Andrews v. Hawley*, 26 L. J., Exch. 323.

So where the attorney in laying out his client's money on the security of a legacy relied upon an *extract* of the will, and omitted to consult the original (z). So where the attorney does not give reasonable notice to his client of his intention to abandon the cause, unless he is supplied with funds (a). So where an attorney commenced an action on a foreign bill of exchange without ascertaining whether there was an indorsement to the plaintiffs, as required by the law of France (b). "The cases," said *Tindal*, C. J., (c), "appear to establish in general that an attorney is liable for the consequences of ignorance or non-observance of the rules of practice of this court, for the want of care in the preparation of the cause for trial or of attendance thereon with his witnesses, and for the mismanagement of so much of the conduct of a cause as is usually and ordinarily allotted to his department of the profession. Whilst on the other hand he is not liable for error in judgment upon points of new occurrence, or of nice or doubtful construction, or of such as are usually entrusted to men in the higher branch of the profession of the law."

If attorneys, employed by a vendor to settle, on his part, the assignment of a term, allow him to execute an unusual covenant, without explaining the liability thereby incurred, they are responsible to him for the consequent loss, notwithstanding the vendor is himself, at the time of his assignment, aware of the fact, in respect of which he afterwards incurs liability on his covenant (d). The question of negligence is, it seems, for the jury (e).

But it is not every neglect that will subject an attorney to such an action: for an attorney is only bound to use reasonable care and skill in managing the business of his client. He is only liable for *crassa negligentia*. "That cannot be considered as gross negligence, concerning which persons of competent skill may entertain a doubt" (f). Hence an action cannot be maintained against an attorney for negligence in not discovering a defect in the memorial of an annuity, which was subsequently held to be a defect upon a doubtful construction of the statute (g). So, where an action had been brought on a bond given by R. to secure 1000*l.*, and R. admitted his liability, and offered to pay a certain sum, but the attorney for the plaintiff made no application for a compulsory arbitration under sect. 3 of the Common Law Procedure Act, 1854, and ultimately the cause went to trial, where a verdict was taken by consent, subject to a reference to the master to settle the amount due, but in the meantime R. had become bankrupt, and nothing was recovered; it was held, that such an omission by the

(z) *Wilson v. Tucker*, 3 Sta. 154.

(a) *Hoby v. Built*, 3 B. & Ad. 350.

(b) *Leng v. Orsi*, 18 C. B. 610.

(c) *Godefroy v. Dalton*, 6 Bingh. 469.

(d) *Stannard v. Ullithorne*, 10 Bingh.

491.

(e) *Hunter v. Caldwell*, 10 Q. B. 69.

(f) *Per Cresswell, J.*, in *Bulmer v. Gilman*, 4 M. & G. 125.

(g) *Baikie v. Chandless*, 3 Campb. 17. See *Elkington v. Holland*, 9 M. & W. 659.

attorney was not actionable, it being doubtful whether the judge would *certainly* have referred the cause under the above section (*h*).

Defendant, an attorney, being employed to raise money on mortgage for the plaintiff, disclosed to the proposed lender defects in the title of the plaintiff, by reason whereof the plaintiff was subjected to actions at the suit of the lender, was delayed in obtaining the money he wanted, and compelled to give a higher rate of interest; it was held, that this was a breach of duty, for which an action lay against defendant, notwithstanding he had been the attorney of the proposed lender before his retainer by the plaintiff (*i*).

Where an attorney was sued for negligence in allowing judgment to go by default, in an action which the plaintiff had retained him to defend, the negligence having been proved, it was held that it lay upon the attorney to show that the plaintiff was not damnified by the judgment by default, and not upon the plaintiff to establish that he had been in fact damnified (*k*). The Court of Chancery has no jurisdiction to make a solicitor responsible for negligence in the conduct of a suit (*l*). An attorney has a general authority to compromise an action on behalf of his client, provided he act *bonâ fide* and reasonably, and not in defiance of the direct and positive instructions of the client (*m*). Where the misconduct or negligence of the attorney constitutes the cause of action, the statute of limitations begins to run from the time of the misconduct (*n*).

Evidence.—The regular proof of a person being an attorney, is either by the production of the original roll, signed by the party on his admission, together with proof of his signature, as evidence of identity; or by an examined copy of the roll, together with the admission (*o*). But in an action by an attorney for his bill, it is sufficient for him to prove that he has acted as an attorney in the court of which he is alleged to be an attorney, and it lies on the defendant to show the contrary (*p*). And now, by the 23 & 24 Vict. c. 127, s. 22, the "Law List" is *primâ facie* evidence that a person is or is not a certificated attorney.

In an action brought by an attorney for slandering him in his profession, it appeared that the defendant had charged him with swindling his client, adding a threat that he would have him (the attorney) struck off the roll; it was held, that this threat imported that the plaintiff was an attorney, and superseded the necessity of

(*h*) *Chapman v. Van Toll*, 27 L. J., Q. B. 1.

(*i*) *Taylor v. Blacklow*, 3 B. N. C. 235.

(*k*) *Godefroy v. Jay*, 7 Bingh. 413.

(*l*) *Frankland v. Lucas*, 4 Sim. 586.

(*m*) *Prestwich v. Poley*, 18 C. B. (N. S.) 806; 34 L. J. C. P. 189.

(*n*) *Howell v. Young*, 5 B. & C. 259.

(*o*) 2 Phillips' Evid. p. 159, 5th ed.

(*p*) *Pearce v. Whale*, 5 B. & C. 38.

other proof (r). But if the gist of the slander were that the plaintiff was not in fact entitled to practise as an attorney, such evidence would seem to be insufficient (s).

A copy of an attorney's bill, although not signed (the original having been proved to have been delivered to the defendant), will be received in evidence, without proof of notice to produce the original, because the bill delivered is itself in the nature of a notice (t).

(r) *Berryman v. Wise*, 4 T. R. 366.

(s) *Collins v. Carnegie*, 1 A. & E. 695.

(t) *Colling v. Treweek*, 6 B. & C. 394.

So secondary evidence may be given of a

written notice of the dishonour of a bill of exchange, without any notice having been given to produce it. *Swain v. Lewis*, 2 C. M. & R. 261.

CHAPTER VII.

AUCTION.

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A SALE by auction of *lands* is within the 4th section, and a like sale of goods (*a*) is within the 17th section of the Statute of Frauds (29 Car. II. c. 3); and to make it binding, the solemnities required by that statute must be observed (*b*); the auctioneer is exclusively the agent of the vendor until the hammer is down, when he also becomes the agent of the purchaser to complete the purchase (*c*), and a note or memorandum in writing of the agreement or bargain, made and signed by him, will be sufficient to give validity to the contract (*d*). But when the sale by auction is at an end, such agency ceases, and the auctioneer's signature to a contract afterwards entered into will not be sufficient (*e*). If any money is paid as a deposit, though short of the sum stipulated by the conditions of sale, and accepted as such by the auctioneer, it will bind the bargain *quoad* the auctioneer (*f*).

A bidding at an auction may be retracted before the hammer is down, because the assent of the seller is not signified till that takes

(a) *Kenworthy v. Schofield*, 2 B. & C. 945.

(b) *Walker v. Constable*, 1 Bos. & Pul. 306. By sect. 4, "No action shall be brought whereby to charge a defendant upon any contract or sale of lands, tenements, or hereditaments, or any interest in or concerning them, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." By sect. 17, "No contract for the sale of any goods, wares, and merchandizes, for the price of 10*l*. or upwards, shall be good, except the

buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the bargain, or in part of payment, or that some note or memorandum in writing of the same bargain be made and signed by the parties to be charged by such contract, or their agents thereunto lawfully authorized."

(c) *Warlow v. Harrison*, 1 E. & E. 309.

(d) *Kemeys v. Proctor*, 3 Ves. & Beames, 57; *Simon v. Metivier*, 1 Bl. R. 599. See *Bartlett v. Purnell*, 4 Ad. & E. 792.

(e) *Meus v. Carr*, 26 L. J., Exch. 39.

(f) *Harrison v. Roberdeau*, Peake's N. P. C. 163.

place (g), and the vendor may, before that is done, revoke the auctioneer's authority (although at his peril). Therefore, if regardless of a statement that there is to be no reserve, a bidding be made by or on the part of the owner, and the lot is knocked down to the bidder, the last *bond fide* bidder cannot claim the lot, for his offer has never been accepted (h). Usually the auctioneer signs a memorandum of the sale in a book which contains or refers to the printed catalogue and conditions of sale. In such a case, his verbal declarations, superadding any term to (i), or contrary (k) to, the printed conditions of sale, are not admissible in evidence. But if the contract be not thus reduced into writing, such declarations are admissible in evidence (l). The printed particulars cannot be varied (m) by such verbal statements of the auctioneer, either as to the parcels or quality (n) of the subject-matter of sale.

An auctioneer has a special property in goods, which he is employed to sell, and may maintain an action for the price against a buyer (o); but not in a case where the right of a third person intervenes and is established (p). "The rule of law is, that the agent who makes the contract may bring an action on the contract in respect of his privity, and the principal in respect of his interest (q). The general authority of an auctioneer as to receiving payment of purchase money, is to take cash. Therefore, where a purchaser at a sale gave a bill of exchange to the auctioneer, but before it was due the auctioneer's authority to receive payment was revoked, it was held that the delivery of the bill was no defence to an action by vendor for purchase money (r).

If the owner of an estate put up to sale by auction, employ puffers, or even a single puffer, to bid for him, it is a fraud on the real bidders, and the highest bidder cannot be compelled to complete the contract (s). Upon a sale of land by auction under the ordinary conditions, without any stipulation, the courts of equity used to allow one puffer, *i.e.*, they allowed a reserve bidding without notice; but now, by the recent statute of 30 & 31 Vict. c. 48, sales of land that would be invalid in law are also to be invalid in equity (s. 4). By section 5 of this statute it is enacted, "that the particulars or conditions of sale by auction of any land shall state whether such land will be sold without reserve, or

(g) *Payne v. Cave*, 3 T. R. 148.

(h) *Lord St. Leonards' Hand Book*, p. 35, and *Warlow v. Harrison*.

(i) *Powell v. Edmunds*, 12 East, 6.

(k) *Gunnis v. Erhart*, 1 H. Bl. 289.

(l) *Eden v. Blake*, 13 M. & W. 614.

(m) *Shelton v. Livius*, 2 Cr. & J. 411.

(n) *Jones v. Edney*, 3 Campb. 285.

(o) *Williams v. Millington*, 1 H. Bl. 81.

(p) *Dickenson v. Naul*, 4 B. & Ad. 638.

(q) *Lord Abinger*, C. B., on *Williams v. Millington* being cited in *Sykes v. Giles*, 5 M. & W. 650.

(r) *Williams v. Evans*, 13 L. T. (N. S.) 753, Q. B.

(s) *Howard v. Castle*, 6 T. R. 642; *Thomett v. Haines*, 13 M. & W. 367, 372. *Per Parke*, B., *Robinson v. Wall*, 11 Jur. 577, 578, *per Cottenham*, C.; *Mortimer v. Bell*, 1 L. R. Ch. App. 10; 35 L. J. 25 Ch.; *Green v. Baverstock*, 14 C. B. (N. S.) 204; 32 L. J. 181, C. P.

subject to a reserved price, or whether a right to bid is reserved ; if it is stated that such land will be sold without reserve, or to that effect, then it shall not be lawful for the seller to employ any person to bid at such sale, or for the auctioneer to take knowingly any bidding from any such person."

An action will not lie against an auctioneer for selling a horse at the highest price bid for him contrary to the owner's express directions not to let him go under a larger sum, for such an arrangement would be a fraud upon the public. If the owner does not wish to sell his goods under a certain price, he should put them up at that price, or state it in the conditions of sale, and he may not privately bid for his own goods. The auctioneer may bid for a third person, but not for the owner (t).

It was held by *Gurney, B.*, that a "knock out," i.e., an agreement among brokers that only one of them shall bid at an auction in order that the goods may be knocked down at less than their fair value, and that they may afterwards resell the goods and divide the profits, is an indictable conspiracy (u). But a contract between two persons not to bid against each other, with no further stipulation, has been held in equity not to be illegal (x).

Liability of Auctioneer.—Where an estate is sold by auction, if a good title is not made out according to the conditions of sale, an action against the auctioneer for the recovery of the deposit, may be maintained, the deposit not appearing to have been paid over to the principal. An auctioneer is personally liable for the noncompletion of the contract where he does not name his principal. *Per Kenyon, C. J.* (y). He is liable, as in other cases, for the consequences of his own misstatement (z); but as his authority may be revoked at any time before the sale has actually taken place (a), he is not liable for not selling, or for not selling on the terms announced by him, if his authority be so revoked by his principal (b); at all events, he is not liable under such circumstances if he has all along named his principal, or described him and names his agent (c). So where the defendant was both auctioneer and attorney for the sellers, although he paid over the deposit to the sellers before demand, yet he was held liable, on the ground that he was not authorized to part with the deposit, when he must, from his employment as attorney for the sellers, have known long before he paid it over that the title was disputable, and consequently that he had paid the money over in his

(t) *Beawell v. Christie*, Cowp. 395.

(u) *Levi v. Levi*, 6 C. & P. 239.

(x) *Galton v. Emuss*, 8 Jur. 507.

(y) *Hanson v. Roberdeau*, Peake's N. P. C. 163; *Franklyn v. Lamond*, 4 C. B. 644.

(z) *Mainprice v. Westley*, 34 L. J. Q. B. 229; 6 B. & S. 420.

(a) *Manser v. Beck*, 6 Hare, 443.

(b) *Per Lord St. Leonard's Handy Book*, p. 25, 7th ed.

(c) *Mainprice v. Westley*, *supra*; see, also, *Warlow v. Harrison*, 1 E. & E. 309; 28 L. J. Q. B. 18; 29 L. J. Q. B. in error, 14.

own wrong (*d*). *Heath*, J., added, that it was admitted that if express notice had been given to defendant not to pay over the money, the action would lie, and he considered the defendant's knowledge, as seller's attorney, of doubts as to the title, as equivalent to express notice (*e*). And in a more recent case, it was determined, that where an auctioneer sells an estate by public auction and receives a deposit, it is his duty, as the agent of both vendor and purchaser, to retain the deposit until the sale is complete, and it is ascertained to whom the money belongs (*f*). Thus where an auctioneer sold an estate by public auction, and received the deposit, and signed an agreement stating that he acknowledged to have sold the estate, and that he agreed to complete the sale; and the sale was not completed on account of a defect of title; it was held, that the purchaser might recover the deposit in an action for money had and received against the auctioneer, though the latter had paid it over to the vendor, without any notice from the purchaser not to do so, and before the defect of title was ascertained (*g*). In strict law, the auctioneer, being a stakeholder, is not entitled to notice of the contract having been rescinded (*h*). When the purchaser refuses to complete the contract, the question whether the deposit is forfeited, if not expressly provided for, depends on the construction of the whole agreement; if not forfeited, it is recoverable when the vendor has incapacitated himself from conveying, not before (*i*).

Recovery of Deposit and Interest on Defect of Title.—When the vendor was the owner of the estate, and an objection having been made to the title, he offered to convey the estate with such title as he had, or to return the purchase money with interest; it was held, that further damages for the supposed goodness of the bargain could not be recovered (*k*). But where a person who had contracted for the purchase of an estate, but had not obtained a conveyance, put up the estate for sale in lots by auction, and engaged to make a good title by a certain day, which he was unable to do, as his vendor never made a conveyance to him; it was held, that a purchaser of certain lots might, in an action for not making a good title, recover not only the expenses which he had incurred, but also damages for the loss which he sustained by not having the contract carried into effect (*l*). In the foregoing case the defendant had sold property as his own, which was not so; and the court was of opinion, that the defendant being in fault by representing himself as the owner of the property, the plaintiff's right was not

(*d*) *Edwards v. Hodding*, 5 Taunt. 815.

(*e*) *Burrough v. Skinner*, 5 Burr. 2639.

(*f*) *Gray v. Gutteridge*, 1 M. & R. 614.

(*g*) *Ibid.*

(*h*) *Duncan v. Cafe*, 2 M. & W. 244.

(*i*) *Palmer v. Temple*, 9 A. & E. 520.

(*k*) *Flureau v. Thornhill*, 2 Bl. Rep. 1078.

(*l*) *Hopkins v. Grazebrook*, 6 B. & C. 31.

restrained to nominal damages (*m*). But where premises for which a party had contracted were by him offered for resale before he had examined the abstract with the original deeds, although the title proved afterwards defective, it was held, that the damage, if any, resulting from such offer, arose from his own premature act, and not from any fault of the vendor, and consequently that the vendor was only liable for the expenses incurred in the investigation of the title and nominal damages for the breach of the contract (*n*). "A man who takes possession of land, and is imprudent enough to incur expenses without satisfying himself as to the title, does it at his own risk, and must bear the loss. In common prudence he ought to investigate the title in the first instance" (*o*).

Where the purchaser, upon failure of the vendor to deduce a title, had recovered back the deposit in an action against the auctioneer, it was held, that he might recover interest on the deposit, in an action against the vendor for not completing his contract, under an averment for special damage (*p*). The expenses incurred in investigating the title, including the amount of the purchaser's unpaid attorney's bill, may be recovered under the general averment that the plaintiff was put to expense in investigating the title (*q*), and also damages for loss incurred after the time limited for completing the purchase, upon a declaration framed accordingly (*r*). Upon an abandonment of an *unwritten* contract for the sale of land on defect of title, the expenses of investigating the title cannot be recovered, nor interest upon the deposit (*s*).

An auctioneer is not liable for interest on the deposit; it was formerly considered that to make the auctioneer liable for interest, it must appear, 1st, that the contract on failure of condition had been rescinded; 2ndly, that a demand of deposit had been made, and refusal to return it (*t*), and, according to *Burrough*, J. (*u*), it must have been proved that the auctioneer had made interest of the money. But it has now been solemnly decided that an auctioneer, pending the time which elapses between the payment of deposit and completion of title, is a mere stakeholder, and not liable for interest to the vendor, although the vendor (without the concurrence of the vendee), gave the auctioneer notice to invest the money in government securities, and although interest may have been made (*x*). As the auctioneer is entitled to retain the

(*m*) See *Robinson v. Hardman*, 1 Exch. 850.

(*n*) *Walker v. Moore*, 10 B. & C. 416.

(*o*) *Per Coltman, J.*, in *Worthington v. Warrington*, 18 L. J., C. P. 350; *S. C.*, 8 C. B. 134.

(*p*) *Farquhar v. Farley*, 7 Taunt. 592; *Camfield v. Gilbert*, 4 Esp. 221.

(*q*) *Richards v. Barton*, 1 Esp. N. P.

C. 268; *Richardson v. Chason*, 10 Q. B. 756.

(*r*) *Metcalf v. Fowler*, 6 M. & W. 830.

(*s*) *Gosbell v. Archer*, 2 A. & E. 500.

(*t*) *Per Burrough, J.*, *Lee v. Munn*, 8 Taunt. 55.

(*u*) *Curling v. Shuttleworth*, 6 Bing. 134.

(*x*) *Harrington v. Hoggart*, 1 B. & Ad. 577.

deposit until the contract is completed, without paying interest for it, where the amount of the deposit is large, it may be advisable to stipulate that, pending the investigation of the title, the deposit should be invested in exchequer bills.

Where leasehold premises are sold by auction, and the lease containing the usual covenant to repair is produced and read to the bidders, if a part of the buildings, *e.g.*, a summer-house, demised and described in the lease, has been pulled down before the sale, the purchaser is not bound to complete the purchase, and may recover his deposit. *Note.*—The summer-house was not described in the particulars of sale (*y*).

An action for money had and received (*z*) was brought to recover the deposit money by plaintiff, who was the purchaser of an annuity sold by defendant (an auctioneer) at a public auction. One of the conditions of sale was, that a good title should be made out by the 10th of July. In the beginning of July the plaintiff called on the seller of the annuity to show him the title deeds, but he, not having them in possession, gave him an abstract of the title, which did not mention any of the deeds. On behalf of the defendant, it was suggested that application ought to have been made to the vendor at an earlier period, in order to enable him to procure the title deeds by the 10th of July. *Kenyon, C. J.* "A seller of an estate ought to be prepared to produce his title deeds at the particular day. A court of equity will, under particular circumstances, enlarge the time (*a*), but then the circumstances entitling him to such indulgence must clearly appear, which is not the case in this instance. It is objected, that the plaintiff had no right to the possession of the deeds: but though he had no right to keep them, he had a right to inspect. A court of equity would have obliged the vendor to give attested copies of the deeds at his own expense, with an undertaking to produce them thereafter at the vendee's expense for the support of his title. As the seller has here failed in completing his engagement, plaintiff is entitled to a return of the deposit." Verdict for plaintiff 280*l.*, amount of deposit. The day for the completion of the purchase of an interest in land, inserted in a written contract, cannot be waived by a parol agreement, and another day substituted, so as to bind the parties (*b*).

An action for money had and received was brought to recover the amount of a deposit paid by the plaintiff to the defendant, on an agreement for the purchase of an estate, the defendant having failed to make out a good title on the day when the purchase was

(*y*) *Granger v. Worms*, 4 Campb. 83.

(*z*) *Berry v. Young*, 2 Esp. N. P. C. 640.

(*a*) *Langford v. Pitt*, 2 P. Wms. 630.
See *Roberts v. Berry*, 22 L. J., Chanc.

398.

(*b*) *Per Tindal, C. J.*, delivering judgment of the court in *Stowell v. Robinson*, 3 B. N. C. 937, 938, recognizing *Goss v. Lord Nugent*, 5 B. & Ad. 58.

to be completed. The abstract of the title delivered to the plaintiff began in the year 1793, and after reciting that the deeds relating to the estate had been lost, stated a fine and non-claim. Upon inquiry it was found that the fact of the deeds having been lost was not true. The counsel for the defendant said, they were ready to make out a good title. *Kenyon, C. J.*:—"As to the sentiments which I have long entertained relative to the purchase of real estates, I find no reason for receding from them. They have been confirmed by conversing with those whose authority is much greater than mine. The vendor must be prepared to make out a good title on the day when a purchase is to be completed. Indulgence, I am aware, is often given for the purpose of procuring probates of wills, letters of administration, and acts of parliament. But this indulgence is voluntary on the part of the intended purchaser; it is the duty of the seller to be ready to verify his abstract at the day on which it was agreed that the purchase should be completed. If the seller deliver an abstract, setting forth a defective title, the plaintiff may object to it. No man was ever induced to take a title like the present. A fine and non-claim are good splices to another title, but they will not do alone. There are many exceptions in the statute in favour of infants, *femes covert*," &c. *Erskine*, for the defendant: "Do I understand your Lordship to say, that though the defendant can now make out a good title, yet as that title did not form a part of the abstract, the plaintiff may avail himself of that circumstance?" *Kenyon, C. J.*: "He certainly may, and avoid the contract. When the abstract is delivered by the seller, he must be able to verify it by the title deeds in his possession. As a good title was not made out at the day fixed, I shall direct the jury to find a verdict for the deposit, with interest up to that day." The jury found a verdict for the plaintiff accordingly (c).

If a precise day is not fixed by which it is incumbent on the vendor to deduce a good title, the law implies that he shall have a reasonable time (d).

A contract to make a good title means a title good both at law and in equity. Therefore in an action to recover back the deposit on a purchase, upon the vendor's failure to make a good title, a court of law will collaterally inquire whether the title be good in equity (e). And where upon a sale there is such a doubt upon the vendor's title as to render it probable that the purchaser's right may become a matter of investigation, the court will not compel the purchaser to complete the purchase (f). But in assumpsit to

(c) *Cornish v. Rowley*, B. R. Middlesex Sittings after M. T. 40 Geo. III. MSS. See *Hanship v. Padwick*, 5 Exch. 615—623 per *Alderson*, B.

(d) *Sansom v. Rhodes*, 6 B. N. C. 261.

(e) *Maberley v. Robins*, 5 Taunt. 625;

1 Marsh. 258. See *Willett v. Clarke*, 10 Price, 207.

(f) *Curling v. Shuttleworth*, 6 Bingh. 121, stated by *Alderson, J.*, in *Boyman v. Gutch*, 7 Bingh. 390, to have been questioned in K. B.

recover a deposit upon the purchase, upon an allegation that the defendant had failed to make proper title, the Court of C. B. held, that they would not consider, whether the title was of a doubtful description, such as a court of equity would not compel an unwilling purchaser to take, but simply whether the defendant had or had not a legal title to convey (*g*). "We are not to consider ourselves as a court of equity, where the seller is seeking to enforce the purchase by a bill for a specific performance, in which case that court frequently refuses the aid of its authority to enforce a performance, where the title is of an unmarketable or even doubtful description; leaving the party to his action at law for damages; but we are called upon to answer the simple question on this record, whether, on the construction of a deed, the defendant has or has not a legal title to convey to a purchaser: and although the deed appears to be inartificially framed, we think, upon the proper construction of it, the defendant has, and at the time of the exposure to sale had, good right and title to sell and assign to the plaintiff, and consequently that the present action, grounded on that breach of contract, cannot be maintained (*h*).

In every contract for the sale of an existing lease, there is an implied undertaking by a vendor (if the contrary be not stipulated in express terms) to make out the lessor's title to demise; and from the short residue of the term, the small value of the property, and the absence of any premium for the lease, it cannot be inferred, that the vendee intended to waive his right to call for the production of the lessor's title (*i*).

Auctioneers who take upon themselves to describe in their particulars the property to be sold, should truly describe it (*k*); for the buyers act on the faith of those descriptions. Hence, where leasehold houses were described in the particulars and conditions of sale as a well-secured rental with reversionary interest, and as an eligible investment, and no notice was given that, by the provisions of a local act power was given to a market company to purchase and take the property for the purposes of the act, it was held, that the purchaser was entitled to rescind the contract (*l*). A lessee of lands subject to a covenant against certain obnoxious trades, with a proviso for re-entry, granted under-leases

(*g*) *Boyman v. Gutch*, 7 Bingh. 379.

(*h*) *Per Tindal, C. J.*, delivering judgment of court in *Boyman v. Gutch*, *ubi sup.* But see *Jeakes v. White*, 6 Exch. 873, in which case *Alderson, B.*, and *Platt, B.*, held that by a "good title" was to be understood such a title as a court of equity would adopt as a sufficient ground for compelling specific performance, and such a title as would be a good answer to an ejectment by a claimant; but *Martin, B.*, held that it was

sufficient to establish a legal title only. *Boyman v. Gutch* does not, however, seem to have been cited in *Jeakes v. White*. See *Simmons v. Heseltine*, 28 L. J. 129, C. P.

(*i*) *Souter v. Drake*, 5 B. & Ad. 992; *Hall v. Betty*, 4 M. & Gr. 413.

(*k*) *Coverley v. Burrell*, 5 B. & A. 257.

(*l*) *Ballard v. Way*, 1 M. & W. 520; and see *Lachlan v. Reynolds*, 23 L. J., Chan. 8.

of houses erected on the land, not containing a similar covenant and proviso: it was held, that a purchaser by auction of houses on the same land, and of the improved ground-rents of the houses so underlet, might recover his deposit, this omission in the underleases not having been mentioned in the conditions of sale (*m*). When certain goods were put up for sale, and each lot was described as being of so many yards, and the goods were open to public inspection for two days before the sale, and by the printed conditions of sale the purchaser of any lot was to pay down a deposit: the lots to be taken away with all faults, imperfections, or errors of description, on a day specified, and the remainder of the purchase-money to be paid on delivery, the biddings at the sale being at so much per yard; it was held, that in such a sale no condition is implied, that a purchaser may inspect and measure the lots before paying the remainder of the purchase-money; and that payment before delivery meant delivery for any purpose (*n*).

A written paper, delivered by an auctioneer to a bidder to whom lands were let by auction, containing the description of the lands, the terms for which they were let to the bidder, and the rent payable, does not require a stamp, unless it be signed by some of the parties or by the auctioneer; nor is it such a writing as will exclude parol evidence (*o*): but if signed by the auctioneer, and delivered to the bidder, it ought to be stamped (*p*).

Where, by the conditions, the only authority given to the auctioneer is to receive the deposit money, and no agent is named for the purpose of receiving the remainder of the purchase money, the payment of such remainder ought to be made to the vendor or his general agent, which the auctioneer is not. At all events, the auctioneer, under such conditions, has no authority to receive the purchase money by means of a bill of exchange (*q*).

In an action against the vendor of an estate to recover the deposit on a contract for the purchase, if the defendant, on notice, produce the contract, the plaintiff need not prove its execution; for an instrument produced on notice by a party claiming an interest under it, does not require to be so proved (*r*). A sale by public auction at a horse repository, out of the city of London, is not a sale in market overt (*s*).

One of the conditions of a sale by auction was:—"If the purchaser shall fail to comply with the conditions, the deposit shall be

(*m*) *Waring v. Hoggart*, 1 Ry. & M. 277.
39.

(*n*) *Pettitt v. Mitchell*, 4 M. & G. 819;
5 Scott's N. R. 721, distinguishing the
cases of *Howe v. Palmer*, 3 B. & Ald.
321; and *Lorymer v. Smith*, 1 B. & C. 1.

(*o*) *Ramsbottom v. Tunbridge*, 2 M. &
S. 434; *Ingram v. Lea*, 2 Campb. 521;
Adams v. Fairbairn, 2 Stark. N. P. C.

(*p*) *Ramsbottom v. Mortley*, 2 M. & S.
445.

(*q*) *Sykes v. Giles*, 5 M. & W. 645.

(*r*) *Bradshaw v. Bennett*, 1 M. & Rob.
143; *Doe v. Wainwright*, 5 A. & E. 520,
528.

(*s*) *Lee v. Bayes*, 18 C. B. 599; 25 L.
J., C. P. 249.

actually forfeited to the vendor, who shall be at liberty to resell, and any deficiency upon resale, together with the expenses, shall be made good by the defaulter, and, on non-payment, shall be recoverable as liquidated damages; but any increase of price at the second sale shall belong to the vendor." Default having been made by a purchaser at the auction, and the property resold at a reduced price, it was held, that the vendor could recover from the defaulter, in addition to the deposit, only so much of the difference between the two prices and of the expenses of resale as the deposit did not cover (*t*).

(*t*) *Ockenenden v. Henley*, 27 L. J., Q. B. 361.

[For Chapter on "BANKRUPTCY," see end of Vol. II.]

CHAPTER VIII.

BARON AND FEME.

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I. *Of the Liability of the Husband.*

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1. *In respect of Contracts made by the Wife before Coverture.*—The husband is liable to the debts of his wife, contracted by her before the coverture (a); and in actions for the recovery of such debts, husband and wife must be joined (b). But if these debts are not recovered against the husband and wife, in the lifetime of the wife, the husband cannot be charged for them either at law or in equity after the death of the wife (c). If the wife survive the husband, an action may be maintained against her for the recovery of these debts (d); unless during the coverture the husband has been discharged under the Insolvent Debtors' Act, in which case the wife is discharged for ever (e); and such discharge is also a good

(a) F. N. B. 120, F.

(b) 7 T. R. 348.

(c) F. N. B. 121, C.; 1 Rol. Abr. 351, (G.) pl. 2.

(d) *Woodman v. Chapman*, 1 Campb. 189, Lord *Ellenborough*, C. J.(e) *Lockwood v. Salter*, 5 B. & Ad. 303.

defence to an action brought against the husband and wife jointly, for a debt due by the wife *dum sola* (f).

The defendant's wife, before marriage, gave a promissory note for 50*l.* to the plaintiff, and afterwards married the defendant, who had with her personal estate to the amount of 700*l.*, part whereof consisted of choses in action. The plaintiff did not during the coverture recover judgment upon the note against the husband and wife. The wife died about a year after the marriage. The defendant on her death took out letters of administration. Some of the choses in action had been received by the defendant as husband in the lifetime of the wife; the rest he took as her administrator. The plaintiff, finding that the choses in action were not sufficient to satisfy his demand, filed a bill against the defendant, praying that the defendant should be made liable to answer his the plaintiff's demand, for so much as he had received out of the clear personal estate of the wife upon his marriage: Lord Talbot, Ch., said, that as on the one hand the husband was by law liable, during the coverture, to all debts contracted by his wife *dum sola*, whatever their amount might be, although she did not bring him a portion of one shilling; so, on the other hand, it was certain, that if such debts were not recovered during the coverture, the husband, as such, was not chargeable, let the fortune he received with his wife be ever so great. He added, that the wife's choses in action were assets, and thereupon decreed an account of what the husband had received since his wife's death as her administrator, and that he should be liable for so much only; but, as to any further demand against him, dismissed the bill (g).

2. *In respect of Contracts made by the Wife during Coverture.*—All the personal estate of which the wife is possessed in her own right, is by the marriage vested absolutely in the husband (h). The marriage is an absolute gift of all chattels personal in possession of her own right, whether the husband survive the wife or not; even the wearing apparel of a married woman, bought by her out of an income settled in the hands of trustees to her sole and separate use, belongs to her husband, and may be taken in execution for his debts (i). But with respect to *choses in action*, as debts by obligation, contract, or otherwise, the husband shall not have them unless he and his wife recover them. And of personal goods *en autre droit*, as executrix or administratrix, &c., the marriage is no gift of them to the husband although he survive his wife (k).

(f) *Sherrington v. Yates*, 12 M. & W. 855, 864.

(g) *Heard v. Stamford*, 3 P. Wms. 409; Ca. Temp. Talb. 173.

(h) 1 Inst. 351, b, recognized in *Cheechi v. Powell*, 6 B. & C. 253.

(i) *Carne v. Brice*, 7 M. & W. 183, cited by Tindal, C. J., in *Tugman v. Hopkins*, 4 M. & G. 401.

(k) 1 Inst. 351, b, cited *per Tenterden*, C. J., delivering judgment in *Richards v. Richards*, 2 B. & Ad. 453.

Notwithstanding the law thus divests the wife of all her personal property, she cannot bind her husband by any contracts, even for necessities suitable to her degree and estate, without the assent of her husband, either express or implied. "A feme covert generally cannot bind or charge her husband by any contract made by her without the authority or assent of her husband, precedent or subsequent, express or implied" (l).

During cohabitation the law will, from that circumstance, presume the assent of the husband to all contracts made by the wife for necessities suitable to his degree and estate, and the misconduct or even the adultery of the wife, during that period, will not destroy this presumption. The same law is, where the husband deserts his wife, or turns her away without any reasonable ground, or compels her, by ill-usage or severity, to leave him; in all which cases he gives the wife a general credit (m). "If the husband turns his wife out of doors," said Lord *Kenyon*, "though he advertises her and cautions all persons not to trust her, or if he gave particular notice to individuals not to give her credit, still he would be liable for necessities furnished to her; for the law has said that where a man has turned his wife out of doors, he sends with her credit for her reasonable expenses" (n). This principle, which tends to procure credit to the wife for necessities suitable to the degree and estate of her husband, is anxiously adopted by the law on every possible occasion; and although in conformity with the ancient rule respecting dower, it has been decided, that where the wife elopes with an adulterer, the husband's assent to her contracts during the term of elopement cannot be implied; yet by analogy to the same rule, as soon as he receives her again, the presumption of law revives, and attaches upon the contracts made by her after the reconciliation (o). But as cohabitation is *presumptive* evidence only of such assent, it may be rebutted by contrary evidence (p). In like manner, evidence that the articles purchased were consumed in the family of the husband, is only presumptive and not conclusive evidence of the husband's assent (q). This presumption from cohabitation applies only where a woman is living with a man as his wife, although not in fact married to him, and will continue after such cohabitation has ceased, if the creditor has not been informed of the separation (r).

Where the wife is not living with the husband, there is no presumption that she has authority to bind him for necessities, but

(l) Mr. *J. Hyde's* argument in *Manby v. Scott*, 1 Mod. 125.

(m) Per Lord *Kenyon*, C. J., in *Hodges v. Hodges*, 1 Esp. N. P. C. 441.

(n) *Harris v. Morris*, 4 Esp. N. P. C. 42.

(o) Per Lord *Kenyon*, C. J., 4 Esp. N.

P. C. 42.

(p) *Manby v. Scott*, 1 Bac. Abr. 296; 2 Smith's L. C.

(q) 1 Sid. 121, 126, S. C.

(r) *Ryan v. Sams*, 12 Q. B. 400; 17 L. J., Q. B. 271; and see *post*, p. 236

the plaintiff may show that the circumstances of the separation were such that the law will imply that she had such authority (s).

Having thus laid down the general positions respecting contracts made by the wife, I shall proceed to establish them by authorities; premising that the relation of husband and wife is, in respect of the wife's contract binding the husband, analogous to the relation of master and servant. Indeed, in contemplation of law, the wife is the servant of the husband. In F. N. B. 120 G. it is thus laid down: A man shall be charged in debt for the contract of his bailiff or servant, where he giveth authority unto his bailiff or servant to buy and sell for him; *and so for the contract of the wife, if he give such authority to his wife, otherwise not.* From this passage it appears, that the husband is not liable to his wife's contracts, unless he has given his authority or assent; it is incumbent, therefore, on a creditor who brings an action against a husband upon a contract made by his wife, to show that the husband has given such assent, or to lay before a jury such circumstances as will enable them to presume that such an assent has been given (t); and, in the latter case, if such presumption is not rebutted by contrary evidence, the jury may find against the husband, but not otherwise; for the wife has not any power originally to charge the husband, but is absolutely under his power and government, and must be content with what the husband provides; and if he does not provide necessities for her, her only remedy is in the spiritual court (u). A person who contracts with an ordinary agent, contracts with one capable of contracting in his own name; but he who contracts with a married woman, knows that she is in general incapable of making any contract by which she is personally bound (v). In an action for goods sold and delivered, the evidence to charge the defendant was, that the defendant's wife bought the goods to make her clothes, and that they cohabited. On the other side it was proved, that she was not in want of any clothes when she purchased these, and that the defendant, the last time that he paid the plaintiff, warned the plaintiff's servant not to trust her any more, and to give his master notice of it. *Holt, C.J.*, said, that during cohabitation the husband shall answer all contracts of the wife for necessities, for his assent shall be presumed to all such contracts upon the account of cohabiting, unless the contrary appear. But if the contrary appear, as by the warning in this case, there is not any room for such presumption; and he held, that the notice to the servant usually employed by the plaintiff in his trade was sufficient notice to the master (w).

(s) *Mainwaring v. Leslie*, 1 M. & Malk. 18; per *Abbott, C. J.*

(t) 1 Sid. 127.

(u) Per *Holt, C. J.*, in *Etherington v. Parrot*, Lord Raym. 1006.

(v) Per *Alderson, B.*, delivering judgment of court in *Smout v. Ilbery*, 10 M.

& W. 21.

(w) *Etherington v. Parrot*, Salk. 118, and Raym. 1006. This case was agreed, per *Cur.*, to be good law in *Boulton v. Prentice*, M. T. 18 Geo. II., Ford's MSS. post, p. 233.

Where a husband, not separated from his wife, makes an allowance for the supply of herself and family with necessaries during his temporary absence, and a tradesman with notice of this supplies her with goods, the husband is not liable for the debt (*y*). So if the husband makes his wife a sufficient allowance for dress, he is not liable for dresses supplied to her without his knowledge, and the fact of the wife having within a particular period purchased various articles of dress of different tradesmen is admissible in evidence to rebut the presumption arising from cohabitation (*z*). The question to be left to the jury in all these cases is, whether, from all the circumstances proved, they are of opinion that the wife had authority, either express or implied, to bind her husband by the contract sued upon, and not merely whether they were necessaries for the wife in her station of life (*a*). The case of *Jolly v. Rees* (*b*) would seem to determine that when husband and wife are living together, and the former has given the latter an express injunction not to incur debts, the husband will not be liable under any circumstances, or at any rate under any circumstances short of absolute cruelty, for goods supplied to his wife without his knowledge. In this case a husband forbade his wife, who was living with him, to incur debts for clothing herself and daughters, but agreed to make her an allowance for the purpose. The allowance promised was sufficient, but only an insufficient part was actually paid. The plaintiff, who had no knowledge of the arrangement, supplied the wife with articles of dress for herself and daughters. The defendant was unaware of the circumstances under which the goods had been supplied. In an action for goods sold and delivered the Court of Common Pleas (Erle, C.J., Williams and Willes, JJ., Byles, J., dissentient), held that the plaintiff could not recover.

If the wife elope from her husband, and live in adultery, the husband cannot be charged by her contracts. In an action for meat, &c., provided for defendant's wife, the defendant proved, that she went away from him with an adulterer; *Raymond*, C.J., held, that the husband should not be charged, though the plaintiff had not any notice; and he said *Holt*, C.J., always ruled it so (*c*). And although the husband has been the aggressor, by living in adultery with another woman, and although he turned his wife out of doors at the time when there was not any imputation on her conduct, yet if she afterwards commit adultery, the husband is not bound to receive or support her after that time, nor is he liable for necessaries which may have been provided for her after that

(*y*) *Holt v. Brien*, 4 B. & A. 252.

(*z*) *Renau v. Teakle*, 8 Exch. 380;
22 L. J., Exch. 241.

(*a*) *Read v. Teakle*, 13 C. B. 627;
22 L. J., C. P. 161. See, also, *Jewsbury*
v. Newbold, 26 L. J., Exch. 247.

(*b*) 15 C. B. (N. S.) 628; 33 L. J.,
C. P. 177.

(*c*) *Morris v. Martin*, Str. 647. See,
also, *Mainwaring v. Sands*, Str. 706,
S. P.

time (d). So where the husband turns his wife out of doors, on account of her having committed adultery under his roof, he is not liable for necessaries furnished to her after the expulsion (e). So if a woman elopes from her husband, though she does not go away with an adulterer, or in an adulterous manner, the tradesman trusts her at his peril, and the husband is not bound (f). A person cannot recover against a husband for the price of goods furnished to his wife, when she is living separate from her husband against his wish and contrary to his intreaties, and when he was willing to have received and provided for her in his own house (g).

If the wife, with the consent of her husband, lives apart from him, and has a separate maintenance, and contracts debts for necessaries during the separation, the law will presume that she is trusted on her own credit, although the tradesman had not any notice of the separation at the time of the contract; if it were the general reputation of the place where the husband lived, that he and his wife were living apart. The plaintiff brought an action against the defendant, a clergyman, who resided in the country, for medicines provided for the wife of the defendant during her residence in London. It appeared, that the defendant and his wife, having disagreed, had separated by consent for five years, and that upon the separation the defendant had signed an agreement with certain trustees, by which he obliged himself to allow his wife twenty pounds a year, which he had done accordingly. The plaintiff did not know at the time when he furnished the wife with the medicines that she was a married woman. It was ruled by *Holt*, C.J., that the defendant was not liable; for though the plaintiff had not any personal notice of the separation, and though it was not the general reputation in London where the plaintiff lived, that the defendant and his wife were separated, yet, since it was the general reputation in the place where the defendant lived, and that for five years past, it was enough to prevent the wife from charging the husband, even for necessaries: plaintiff nonsuited (h).

Lord *Eldon*, C.J., is reported to have said, that "if the husband gives express notice to a tradesman not to trust his wife, he shall not be charged; and if a tradesman has notice of a separate maintenance being allowed to the wife, that, according to *Holt*, C.J., shall be notice of dissent on the part of the husband, and he shall not be charged; but where the demand is for necessaries, it is incumbent on the husband to show that the tradesman had notice of the separate maintenance" (i). But the accuracy of the report of Lord *Eldon's* ruling as to the necessity of notice, is

(d) *Govier v. Hancock*, 6 T. R. 603.

(e) *Ham v. Toovey*, Middlesex Sittings, June 24, 47 Geo. III. C. B. Sp. J., Sir James Mansfield, C. J., MSS.

(f) *Child v. Hardyman*, Str. 875, per Lord Raymond, C. J.

(g) *Hindley v. Marquis of Westmeath*, 6 B. & C. 200.

(h) *Todd v. Stokes*, Lord Raym. 444, and Salk. 116.

(i) *Ranvlyns v. Vandyke*, 3 Esp. N. P. C. 250.

doubted by *Alderson*, B. ; in a case in which it was held, that where a husband, living apart from his wife, allowed and paid her a sufficient maintenance, he is not liable for necessaries supplied to her, and that notice to the tradesman of that allowance is immaterial (*k*). Assumpsit for the board and lodging of the plaintiff's wife ; plea, *non assumpsit*. Lord *Mansfield*, in his charge to the jury, laid it down as clear law, that " when husband and wife live separate, the person who gives credit to the wife is to be considered as standing in her place, inasmuch as the husband is bound to maintain her ; and the spiritual court, or a court of equity, will compel him to grant her an adequate alimony ; but if she elope from her husband, and live in adultery ; or if, upon separation, the husband agrees to make her a sufficient allowance, *and pays it* ; in either of those cases the husband is not liable ; because in the former case, she forfeits all title to alimony, and, in the latter, has no further demands on her husband. And as, in all cases, the creditor is to be considered as standing in the wife's place, it imports him, when the wife lives apart from her husband, to make strict inquiry as to the terms of separation ; for in such cases he must trust her at his peril (*l*). In the present case, the defendant and his wife had separated, and he had agreed to make her an allowance, but had never paid it ; the jury, therefore, under his lordship's directions, found a verdict for the plaintiff. Note.—In a similar case of *Turner v. Winter*, his lordship nonsuited the plaintiff, because on separation the defendant had agreed to make an allowance to his wife, and had regularly paid it ; notwithstanding the plaintiff had no notice of the transaction.

Where there is no agreement as to the amount, the allowance must be sufficient according to the degree and circumstances of the husband ; and it has been held in many cases that the adequacy of the allowance is a question of fact for the jury (*m*) ; but in a very recent case, where the amount of the allowance paid was undisputed, as also that of the husband's income, and the judge at the trial, considering that such allowance was not inadequate, nonsuited the plaintiff, the Court of Exchequer ruled, " That it was for the plaintiff to show that the allowance was insufficient, and that not having been done, the nonsuit was right" (*n*). " It seems to us," said *Pollock*, C.B., in delivering the judgment of the court, " that the burden of proof is on the person who has trusted the wife, and that when the husband and wife are living apart, the wife's authority is not shown, when it is proved that she is living apart from her husband by mutual consent, with

(*k*) *Mizen v. Pick*, 3 M. & W. 481. See, also, *Atkins v. Pearce*, 26 L. J., C. P. 252.

(*l*) *Ozard v. Darnford*, B. R. Middlesex Sittings after M. T. 20 G. III., MSS.

(*m*) *Hodgkinson v. Fletcher*, 4 Campb.

70 ; per Lord *Ellenborough*, C. J., *Liddlow v. Wilmot*, 2 Stark. N. P. C. 86 ; *Emmett v. Norton*, 8 C. & P. 506.

(*n*) *Johnson v. Sumner*, 27 L. J., Exch 341.

an agreement as between him and her that she is not to pledge his credit, and with an allowance not shown to be inconsistent with that being the real intention and agreement and meaning of the parties." And in a subsequent case, the Court of Exchequer held that where a husband consents to his wife living apart from him, on the terms that she shall accept an allowance from him, and which is paid, she has no authority to bind him for necessaries, although the allowance is inadequate (o).

A mere agreement for a separate allowance, without payment, is not sufficient to exempt the husband from this liability. Husband and wife having agreed to separate, a deed of separation was executed (between the husband on the first part, his wife on the second part, and a trustee, the sister of the wife, on the third part), wherein the husband covenanted with the trustee to pay the wife, during the separation, a weekly allowance; which she agreed to accept, in full satisfaction of her maintenance, provided that if the husband should pay any debt which his wife, during the separation and payment of the annuity, should contract, it should be lawful for him to withhold payment of the weekly allowance, until he should be reimbursed: the wife, upon the separation, went to live with the trustee, who supplied her with necessaries; the husband having failed to pay the weekly allowance, the trustee brought an action of *indebitatus assumpsit* against him for the amount of the necessaries: it was held by *Chambre, Rooke, and Heath, Js.*, that, although the trustee had another remedy, and might have brought an action on the deed, yet *assumpsit* was maintainable, on the ground that there was a common law obligation on the husband to provide necessaries for his wife, although she lived apart from him; that where the law imposed a duty, it raised a promise on the part of the person on whom it was imposed to discharge it; and that the mere covenant, *without payment*, was not sufficient to exempt the husband from this liability. Sir *J. Mansfield, C.J.*, expressed an elaborate opinion to the contrary, observing that a general provision for the separate maintenance of the wife, whether the husband paid it or not, deprived the wife of the advantage of the common law, and prevented the husband from being sued either in *assumpsit* or debt for necessaries furnished to his wife (p). But if the separate allowance be paid, it is sufficient, although the separation be not by deed or writing (q); and the husband is not liable, although no part of the separate maintenance be supplied by him, provided it is sufficient (r). But where a husband by his cruelty compels his wife to live apart from him, he is liable upon contracts made by her for necessaries, notwithstanding she in part receives from him an allowance, but which is found by the

(o) *Biffin v. Bignell*, 7 H. & N. 877.

(p) *Nurse v. Craig*, 2 B. & P. N. R.

148.

(q) *Hodgkinson v. Fletcher*, 4 Campb.

70, per Lord Ellenborough, C. J.

(r) Per Lord Tenterden, C. J., *Clifford v. Laton, M. & Malk.* 101.

jury to be insufficient (s). The husband, however, cannot avail himself of the wife's receipt as evidence of the payment of the allowance (t). A divorce *a mensâ et thoro* for adultery on the part of the husband, with a decree for alimony to the wife, will not discharge the husband from his liability to pay for necessities supplied to the wife, if the alimony be not paid (u). So now in the event of a judicial separation where "alimony has been decreed or ordered to be paid to the wife, and the same shall not be duly paid by the husband, he shall be liable for necessities supplied for her use" (x).

By deed of three parts, between husband, wife, and trustee, reciting that differences existed, and that the husband and wife had agreed to live separate, the husband covenanted to pay an annuity to the wife, during so much of her life as he should live, and the trustee covenanted to indemnify the husband against the wife's debts, and that she should release all claim of jointure, dower, and thirds. It was held that this deed was legal and binding, and that a plea by the husband, that the wife sued in the Ecclesiastical Court for restitution of conjugal rights, and that he put in an allegation and exhibits, charging her with adultery, and that a decree of divorce *a mensâ et thoro* was in that cause pronounced, was not a sufficient answer to an action by the trustee for arrears of the annuity (y). "There are some deeds of separation which are legal; some which are illegal; illegality is not to be presumed, and unless we necessarily see that a transaction is illegal, we are not to put an unfavourable construction upon it" (z).

"If a husband improperly compels his wife to leave his house, he thereby gives her power to pledge his credit for necessities; but if she goes away without his consent, and against his will, I am of opinion that a tradesman giving her credit, does so at his peril. If, under such circumstances, a deed is executed by the husband, securing a provision to the wife, I think that he cannot be sued by any person who may supply goods to his wife, but he is only liable to the trustees for the money which he has covenanted to pay the trustees, which was the form of action adopted in *Jee v. Thurlow*." Per *Bayley, J. (a)*. Where, in pursuance of articles of separation, a wife quits her husband's house against his wishes, and continues

(s) *Baker v. Sampson*, 14 C. B. (N. S.) 383.

(t) *S. C.*

(u) *Hunt v. De Blaquiere*, 5 Bingh. 550.

(x) 20 & 21 Vict. c. 85; s. 26. See *post*, p. 242.

(y) *Jee v. Thurlow*, 2 B. & C. 547; *Baynon v. Batley*, 8 Bingh. 256, S. P. See, also, *Wilson v. Mushett*, 3 B. & Ad. 743; and *Randle v. Gould*, 27 L. J., Q. B. 57.

(z) *Per Bosanquet, J., Waite v. Jones*, 1 Bingh. N. C. 664, 5; 1 Scott, 730, affirmed on error in Exch. Ch., Lords Denman and Abinger dissenting, 5 Bingh. N. C. 341; 7 Scott, 317, affirmed in House of Lords, 4 M. & Gr. 1104; 5 Scott's N. R. 951; and see *Clough v. Lambert*, 10 Sim. 174; *Frampton v. Frampton*, 4 Beav. 287. See further on this subject, *post*, tit. "Covenant."

(a) *Hindley v. Marquis of Westmeath*, 6 B. & C. 213.

to live apart from him, although he is willing and wishes to receive her back, and provide for her in his own house; *semble*, that he is not liable to be sued by tradesmen for debts contracted by her, even for necessaries (*b*). If a husband, living separate from his wife, and allowing her a maintenance, uses such violence towards her that she is obliged to exhibit articles of the peace against him, she may employ an attorney for that purpose at his expense (*c*). Where the wife, whilst living apart and in adultery, acquired and invested money in trust for herself and her illegitimate issue, and she was afterwards convicted of murder and executed, and the trustees expended a considerable part of the fund in her defence: it was held, that the husband was entitled to such funds, and that the trustees could not retain out of the funds the sum so expended, and further that they must bear their costs occasioned by the interpleading rule to try the right (*d*).

A husband, who allowed his wife a separate maintenance, promised to pay the amount of a debt, which she had contracted during the separation; it was held, that he was bound by such promise, and that he could not recede from it, on the ground that the plaintiff knew that he allowed his wife a separate maintenance, and that he had made the promise under a misapprehension of law (*e*).

Where a husband, by bringing another woman under his roof, renders his house unfit for the residence of his wife, who thereupon removes and lives apart from him, the husband is bound to provide the wife with necessaries; *e. g.* medicines in sickness, during the separation (*f*). So where a wife leaves her husband under such apprehension of personal violence, as the jury shall think to have been reasonable, her husband is liable for necessaries (*g*). If the husband causelessly turns away his wife (*h*), or if the wife, having been absent from home, returns, and he shuts his doors against her (*i*), and afterwards she contracts debts for necessaries, the husband will be liable; for he sends with her credit for her reasonable expenses, and if the wife be turned out of doors with violence, she carries along with her credit for whatever her preservation and safety require; *e. g.* the charge of an attorney's bill for assisting her to exhibit articles of the peace against her husband (*k*). "Where a wife's situation in her husband's house is rendered unsafe from his cruelty or ill-treatment, I shall rule it to be equiva-

(*b*) *Hindley v. Marquis of Westmeath*, 6 B. & C. 200.

(*c*) *Turner v. Rookes*, 10 A. & E. 47.

(*d*) *Agar v. Blethyn*, 2 Cr. M. & R. 699; 1 Tyrw. and Gr. 160.

(*e*) *Hornbuckle v. Hornbury*, 2 Stark. 177, Lord Ellenborough, C. J. But see note in Smith's L. C. vol. 2, p. 389, 3rd ed.

(*f*) *Aldis v. Chapman*, Middx. Sittings after Trin. T. 50 Geo. III. Lord Ellenborough, C. J.

(*g*) *Houlston v. Smyth*, 2 C. & P. 22; 3 Bingham. 127.

(*h*) *Lungworthy v. Hockmore*, per Holt, C. J., Lord Raym. 444; and per Holt, C. J., in *Etherington v. Parrott*, Salk. 118.

(*i*) *Thompson v. Hervey*, 4 Burr. 2177.

(*k*) *Shepherd, Gent., &c., v. Mackoul*, 3 Campb. 326, cited in *Grindell v. Godmond*, 5 A. & E. 755.

lent to a turning her out of the house, and that the husband shall be liable for necessities furnished to her under those circumstances" (l). So it has been held that a wife has authority to pledge her husband's credit for the costs of a divorce suit, where there are reasonable, as well as where there are absolute grounds for instituting the suit (m). But if the husband turns away his wife on account of her having committed adultery, then he will not be liable (n).

The following note of *Boulton v. Prentice* (o), which was extracted by the late Mr. Ford from his father's MSS. at the request of the compiler, may be acceptable to the reader. Assumpsit for goods sold and delivered to defendant's wife. Verdict for plaintiff. On motion for a new trial, it appeared that defendant and his wife had formerly lodged at plaintiff's house, during which time the defendant had given plaintiff express notice not to trust defendant's wife. Afterwards defendant and his wife went to lodge at another place, where defendant used his wife ill, after which they separated, and defendant refused to receive her again; she desired him to maintain her, and offered to return and cohabit with him, which he refused, and struck her; and declared that if any person trusted her, or gave her credit, he would not pay them: she had not any clothes, and was wholly destitute of necessities. The goods furnished to her by plaintiff were necessities, and suitable to the condition of the wife. On the part of the defendant it was proved, that defendant's wife used to pawn her clothes, and was addicted to drinking; that plaintiff had assisted her in pawning her watch; and that defendant, a year before they parted, had expressly forbidden plaintiff from trusting defendant's wife. The foundation of moving for a new trial was, that the verdict was contrary to law, as the credit given to the wife is in law grounded on the supposed assent of the husband, which assent cannot be supposed where, as in this case, there is an express prohibition. But it was answered, and so resolved by the court, that, although the prohibition took effect and continued in force during the cohabitation, yet such prohibition could not, after the cohabitation ceased, either extinguish or lessen the credit to which the wife was by law entitled, after the husband had turned her away and refused to maintain her; for the husband, by such conduct, gave his wife such a general credit as amounted to a revocation of the prohibition. If the husband, in a case of this kind, could prohibit one person from trusting his wife, he might *pari ratione* prohibit many; and this might be extended so far as to deprive the wife from obtaining any credit whatsoever, so that particular prohibitions might amount to a total prohibition. If a wife leaves her husband, he is not in that case answerable for

(l) *Per* Lord Kenyon, C. J., in *Hodges v. Hodges*, 1 Esp. N. P. C. 441.

(m) *Brown v. Ackroyd*, 5 E. & B. 819; 25 L. J., Q. B. 193.

(n) *Ham v. Toovey*, *ante*, p. 228.

(o) *Boulton v. Prentice*, from Mr. Ford's MS. Note, *S. C.* shortly reported in Str. 1214.

her contracts; it is the cohabitation which is considered as the evidence of the husband's assent to the contracts made by his wife for necessaries; but if the husband during the cohabitation declares his dissent, by forbidding any person to trust his wife, all persons who have notice of such dissent trust the wife at their peril. The husband is only liable on account of the implied assent to the contracts of the wife, of which assent the cohabitation afterwards induces a presumption, and when he declares the contrary, there is not any longer room for such presumption. But if a husband turns away his wife, he gives her credit wherever she goes, and must pay for necessaries which have been provided for her. Another leading case on this subject is the case of *Manby v. Scott* (p): there the wife of the defendant went away from him against his will, and continued absent many years. Afterwards, and before action brought, or the sale of the goods, she desired to cohabit with her husband, which he refused. During the separation, the husband, who did not allow the wife any maintenance, expressly forbade the plaintiff to deliver any goods to his wife, notwithstanding which, the plaintiff sold to the wife silks and velvets, and then brought an action against the husband for the value of the goods. At the trial, the jury found that the goods were necessary for her, and suitable to the degree of the husband. After three arguments in the Court of King's Bench, the judges were divided, whereupon the case was adjourned into the Exchequer Chamber, where nine of the judges (among whom was *Hale*, Chief Baron,) were of opinion that the husband was not chargeable. But where the defendant's wife voluntarily left his house and resided for many years at her brother's until her death, when her brother, without any communication with the husband, buried her in a suitable manner, it was held that the brother was entitled to sue the husband for the expenses of the funeral (q).

What is necessary, and what is suitable to the degree of the husband, is to be tried by the jury. The rule as to necessaries does not include a counterpart of a deed of separation (r). But the husband is liable to an action, at the suit of the wife's solicitor, for costs necessarily incurred by her in filing a petition in the Divorce Court for a judicial separation on the ground of cruelty and adultery, although the petition is not proceeded with, and the course prescribed by the practice of the Divorce Court for obtaining the wife's costs has not been pursued (s). It is also a question of fact, whether a tradesman who furnishes goods to a wife gives credit to her or her husband: if the credit is given to her, the husband is not liable, though the wife lives with him, and he sees

(p) *Manby v. Scott*, 1 Lev. 4; and 1 Sid. 109, *S. C.* printed from a copy of Sir Orlando Bridgman's MS., forming part of the late Mr. Hargrave's MSS. in the British Museum, and published by S. Bannister, in 8vo. 1823. The judgment, as given by Sir O. Bridgman, will be

found in p. 229. See, also, the report of this case, 2 Smith's L. C.

(q) *Bradshaw v. Beard*, 12 C. B. (N. S.) 344.

(r) *Ladd v. Lynn*, 2 M. & W. 265.

(s) *Rice v. Shepherd*, 12 C. B. (N. S.) 332.

her in possession of some of the goods (t). In *Baker v. Baber*, MSS. Gundry, J.—F. 4, *Keniston v. Goodall* was cited, where Holt, C. J., held a husband not liable for costly apparel furnished to his wife and worn by her in a clandestine manner without his privity. In assumpsit for goods sold, the plaintiff, a jeweller, had, in the course of two months, delivered articles of jewellery to the wife of the defendant, amounting in value to 83*l*. It appeared that the defendant was a certificated special pleader, and living in a ready furnished house, of which the annual rent was 200*l*; that he kept no man servant; that his wife's fortune upon her marriage was less than 4,000*l*.; that she had, at the time of her marriage, jewellery suitable to her condition, and that she had never worn in her husband's presence any articles furnished her by the plaintiff: it appeared also that the plaintiff, when he went to the defendant's house to ask for payment, always inquired for the wife and not for the defendant. It was held, that the goods so furnished were not necessaries, and that, as there was no evidence to go to the jury of any assent of the husband to the contract made by his wife, the action could not be maintained (u). So in *Seaton v. Benedict* (v), where the husband was living with his wife and supplied her with necessaries suitable to her degree: it was held, that the husband was not liable for debts contracted by the wife for expensive articles of dress without the husband's knowledge.

. A defendant treated his wife with great cruelty, and took another woman into the house, with whom he cohabited; he confined his wife in her chamber, under pretence of insanity; she escaped, and the plaintiff brought an action against the defendant for the value of necessaries furnished to the wife after her departure; *Lawrence, J.*, thought that, as the wife might have had necessaries if she had remained, the action could not be supported. And *Mansfield, C. J.*, thought that nothing short of actual terror and violence would support the action (x).

The liability of the husband for necessaries supplied to the wife when separated from him continues, although he becomes insane (y).

If a man cohabits with a woman, to whom he is not married, and permits her to assume his name, and appear to the world as his wife, and in that character to contract debts for necessaries, he will become liable, although the creditor be acquainted with her real situation; for here a like assent will be implied, as in the case of husband and wife (z). But this rule only holds during cohabitation; for when they have separated, the man is no longer

(t) *Bentley v. Griffin*, 5 Taunt. 356.

(u) *Montague v. Benedict*, 3 B. & C. 631.

(v) 5 Bingh. 28.

(x) *Horwood v. Heffer*, 3 Taunt. 421.

But see *Houlston v. Smyth*, 3 Bingh. 127; ante, p. 232.

(y) *Read v. Legard*, 6 Exch. 636.

(z) *Watson v. Threlkeld*, 2 Esp. N. P. C. 637, *Kenyon, C. J.*

liable (a), unless the person supplying the goods has no notice, and is unaware of the separation (b). A man who had for some years cohabited with a woman who passed for his wife, went abroad, leaving her and his family at his residence in this country, and died abroad; it was held by three judges, *absente Tenterden*, C. J., that the executor was not bound to pay for goods which had been supplied to her after the man's death, although before information of his death had been received (c).

Where a man who had been in the habit of dealing with the plaintiff for meat supplied to his house, went abroad, leaving his wife and family resident in this country, and died abroad, it was held, that the wife was not liable for goods supplied to her after his death, but before information of his death had been received (d). *Alderson*, B., delivering the judgment of the court, observed, that "here the agent had full authority to contract, and did contract in the name of the principal: there was no ground for saying that in representing his authority as continuing, she did any wrong—there was not any *mala fides* on her part, or want of due diligence in acquiring knowledge of the revocation—no omission to state any fact within her knowledge relating to it, and the revocation was by the act of God. The continuance of the life of the principal was a fact equally within the knowledge of both contracting parties. It had been, indeed, decided in *Blades v. Free* (e), that in such a case the executors of the husband were not liable; and consequently no one would be liable. That might be so,—yet it was only as it was in the ordinary case of a wife, who made a contract in her husband's lifetime, for which the husband was not liable. There, as here, no one was liable." In an action for the use and occupation of apartments by the defendant's wife, it appeared that the apartments had been occupied by a lady, who went by the defendant's name, and who had actually been married to him. The defence attempted to be set up was, that the defendant had a former wife then, and still living. But Lord *Ellenborough*, C. J., said, that there was not any evidence to fix the plaintiff with a knowledge of the celebration of the first marriage, and that the defendant was estopped to set up bigamy as a bar to the action. He had given the woman who lodged with the plaintiff every appearance of being his wife. By his misconduct in marrying a second wife, while his first was still alive, he had done what he could to confer the rights of marriage upon both, and had incurred a civil as well as a criminal responsibility (f).

An infant widow is liable for the funeral expenses of her husband, upon the ground that they are necessities (g).

(a) *Munro v. De Chemant*, 4 Camp. 9 B. & C. 167.

215. (b) *Ryan v. Sams*, 12 Q. B. 400; 17

L. J., Q. B. 271.

(c) *Blades v. Free, Executor of Clark*.

(d) *Smout v. Ilbery*, 10 M. & W. 1.

(e) 9 B. & C. 167.

(f) *Robinson v. Nahon*, 1 Camp. 245.

(g) *Chapple v. Cooper*, 13 M. & W. 252.

3. *In respect of Children of the Wife by a former Husband.*—If a man marries a woman having children by a former husband, he is not bound (*h*) by the act of marriage to maintain such children (*i*); but if he holds them out to the world as part of his family, he will be considered as standing *in loco parentis*, and liable even on a contract made by his wife during his absence abroad, for the maintenance and education of such children (*k*). Maintenance by the second husband of the children of the wife by a former husband, is a good consideration for a promise by such children, when they come of age, to repay the expense of their maintenance (*l*). The father of a bastard child is liable for its nursing and board, if he adopts it as his own, although an order of filiation has not been made on him (*m*).

II. *In what Cases a Feme Covert may be considered as a Feme Sole (n).*

It is now clearly established, notwithstanding former deci-

(*h*) But see stat. 4 & 5 Will. IV. c. 76, s. 57, Poor Law Act.

(*i*) *Tubb v. Harrison*, 4 T. R. 118, recognized in *Cooper v. Martin*, 4 East, 76.

(*k*) *Stone v. Carr*, 3 Esp. N. P. C. 1, *Kenyon*, C. J.

(*l*) *Cooper v. Martin*, 4 East, 76. See *Rawlins v. Vandyke*, 3 Esp. N. P. C. 252, Lord *Eldon's* opinion as to how far a father is liable for necessities furnished to his children, living with the mother apart from the father.

(*m*) *Heskett v. Gowing*, 5 Esp. N. P. C. 131.

(*n*) By the common law the wife was not permitted to take or enjoy real or personal estate separate from and independent of her husband. This and several other of the rules of the common law relating to this subject have been entirely abrogated by the equity courts, affording a remarkable instance of legislation by judicial decision. The interposition of trustees seems to have been at first considered necessary, but it has been long settled that this is not essential, for equity in such a case considers the husband a trustee for the wife (*Bennett v. Davis*, 2 P. W. 216). Where personal property is settled to the separate use of a married woman she may dispose of it and its produce as a *feme sole* to the full extent of her interest (*Fettiplace v. Georges*, 1 Vesp. 46; *Gore v. Knight*, 2 Ven. 535), but if she does not dispose of the savings before death the husband becomes entitled to them by his marital

right (*Molony v. Kennedy*, 10 Sim. 255), and not as administrator, for he is not next of kin (*per* Lords *Loughborough* and *Eldon*, *Wall v. Wall*, 3 Ves. 246; *Garrish v. Camden*, 14 Ves. 372). Lord *Hardwicke* thought otherwise (*Fettiplace v. Georges*). In the case of real property limited to her separate use, though she may dispose of the rents and profits as a *feme sole* (*Hulme v. Tennant*, 1 B. C. C. 16), she has no power of disposition over the estate except by deed executed under the provisions of the act for the abolition of fines and recoveries (3 & 4 W. IV. c. 74, ss. 40, 77; see, also, 8 & 9 Vict. c. 106), unless the gift is accompanied with an express power of appointment. In equity as at law the wife can incur no personal liability by her engagements in respect to her separate estate. The extent of the liability of the separate estate to general demands appears to be unsettled. It seems established that it is liable to debts for which she has given a written security, as a bond (*Healley v. Thomas*, 15 Ves. 596), or a promissory note (*Bullpin v. Clarke*, 17 Ves. 365), or a written promise to pay (*Murray v. Barber*, 3 M. & K. 209). Perhaps it may be said that her estate is not liable unless she has shown an intention to charge it expressly and in writing in the case of realty on account of the statute of frauds, and expressly or perhaps impliedly in the case of personalty, but not necessarily in writing (*Johnson v. Gallagher*, 30 L. J. 298, Ch. All the authorities are collected in *Tur-*

sions (o) to the contrary, that a feme covert cannot bring an action or be impleaded as a feme sole, while the relation of marriage subsists, and she and her husband are living in this kingdom, notwithstanding she lives separately from her husband, and has a separate maintenance secured to her by deed. This point was solemnly determined (after two arguments before the judges in the Exchequer Chamber,) in *Marshall v. Rutton*, 8 T. R. 545. A woman who has even declared herself to be a feme sole, and as such has executed deeds and maintained actions, if herself sued as a feme sole, is not thereby estopped from setting up a defence of coverture (p). A woman divorced *a mensâ et thoro* for adultery, and living separate from her husband, cannot be sued as a feme sole (q). But the rule of law, which has considered a married woman as incapable of suing, or being sued, without her husband, admits of some modification from particular circumstances:

1. By the custom of the city of London, a feme covert, being a sole trader, may sue or be sued in the city courts as a feme sole, with reference to her transactions in London; but even there the husband must be made a party to the suit for conformity. By the custom of London, "A feme sole merchant is where the feme trades by herself in one trade, in which her husband does not intermeddle, and buys and sells in that trade; then the feme shall be sued, and the husband named only for conformity; and if judgment be given against them, execution shall be against the feme only" (r). "This custom is one of those customs called executory customs, the meaning of which expression is, customs united to the courts of the city of London. They are pleadable in London, and not elsewhere, except so far as they may be made use of in the superior courts by way of bar" (s). A feme covert, sole trader in the city of London, cannot sue (t) or be sued (u), in the courts at Westminster, without her husband.

2. A wife may acquire a separate character by the civil death of her husband, by exile (x), and formerly by profession (y) and abjuration of the realm. "An abjuration, that is, a deportation for

ner, L. J.'s judgment). The courts of equity have so entirely established the independent personality of a feme covert with respect to property settled to her separate use, that if any part of the estate be advanced to her husband upon a contract of loan she may sue him in respect of that contract (*Woodward v. Woodward*, 8 L. T. 751).

(o) *Ringstead v. Lady Lanesborough*, 3 Doug. 197; *Barwell v. Brooks*, 3 Doug. 371; and *Corbett v. Poelnitz*, 1 T. R. 5.

(p) *Davenport v. Nelson*, 4 Campb. 26.

(q) *Lewis v. Lee*, 3 B. & C. 291. But see now 20 & 21 Vict. c. 85. s. 26, *post*, 343.

(r) *Langham v. Bewett*, Cro. Car. 68.

(s) *Per Lord Eldon*, C. J., delivering

the judgment of the court in *Beard v. Webb*, in error, Exchequer Chamber, 2 Bos. & Pul. 98. The judgment here referred to is very elaborate, and may be usefully consulted on the whole subject.

(t) *Caudell v. Shaw*, 4 T. R. 361.

(u) *Beard v. Webb*, 2 B. & P. 93.

(x) *Belknap's case*, 2 Hen. IV. 7, a; it appears by the Year Book, 1 Hen. IV. 1, a, that Belknap was banished to Gascony, there to remain until he attained the king's favour, which Sir E. Coke considered as a banishment for ever.

(y) A man was said to be professed when he had taken the habit of religion and vowed obedience, wilful poverty, and perpetual chastity, 1 Inst. 132, a.

ever into a foreign land, like to profession, is a civil death: and *that is the reason* that the wife may bring an action, or may be impleaded, during the natural life of her husband. And so it is, if by act of parliament the husband be attainted of treason or felony, and saving his life, *is banished for ever*, as Belknap, &c., was: *this is a civil death*, and the wife may sue as a feme sole. But if the husband by act of parliament, have judgment to be *exiled for a time*, which some call a relegation, that is not a civil death (z). Every person who is attainted of high treason, petit treason, or felony, is disabled to bring any action; for he is *extra legem positus*, and is accounted in law *civiliter mortuus*" (a).

3. Where the husband has been transported for a term of years, before the expiration of which the debt was contracted, and sued for; *Yates, J.*, thought that the transportation suspended the disability of the wife, and that she might be sued as a feme sole (b). Lord *Eldon* (c), commenting on this case, having said, that in the cases of abjuration, profession, &c., which amounted to a civil death, he thought he understood the situation in which the wife was placed, for the fiction of law, which considered the husband as civilly dead, put the wife in the same situation as if he were actually dead; then proceeded to observe that, "transportation for a term of years might give rise to many difficulties with respect to the enjoyment of the husband's estate, both real and personal; but, besides the difficulties which might arise during the term of transportation, another difficulty of equal importance occurred, where the wife had contracted debts after the period of her husband's transportation had elapsed, but before his actual return to this country. In the case of *Sparrow v. Carruthers*, Mr. Justice *Yates* seemed to have treated it as a material circumstance in evidence, that the time of transportation was not expired, and he did not give any opinion as to what would have been the situation of the parties if it had been expired. The court could not presume to say how Mr. Justice *Yates* would have decided, had the husband continued to reside abroad, after the period of his transportation had expired or had only remained there to arrange his affairs, with a view of returning to this country when he had so done (d)." Since the preceding observations were made, the following cases were decided at Nisi Prius in 1801: in assumpsit for goods sold and delivered, the defence was, that the plaintiff was a married woman. The plaintiff's counsel answered this case by producing the record of the husband's conviction for felony in March, 1794, and of a sentence of transportation for seven years; whereupon it was insisted, on the part of the defendant, that the sentence being for seven years, from March, 1794, that time was now expired, so that the husband was competent to sue. But Lord *Alvanley*, C.J., said, that by the

(z) 1 Inst. 133, a.

(a) 1 Inst. 130, a.

(b) *Sparrow v. Carruthers*, cited in *Lean v. Schutz*, 2 Bl. R. 1197, and in *Corbett*

v. Poelnitz, 1 T. R. 7.

(c) *Marsh v. Hutchinson*, 2 B. & P. 231.

(d) *Ibid.*

record of the conviction and sentence, there was conclusive evidence to support the right of action in the plaintiff as a feme sole, and though the term of his transportation had expired, if in fact he had not returned, the right of action remained; but that if the defendant meant to rely on the circumstance of the husband having returned, the proof of that lay on the defendant. Evidence to this effect not being offered, the plaintiff had a verdict (e).

4. Where the husband is an alien, who has deserted this kingdom, leaving his wife to act here as a feme sole, the wife may be charged as a feme sole for contracts made after such desertion. In assumpsit for goods sold and delivered (f), the defendant pleaded that she was covert of the Duke de Pienne. It appeared in evidence that the duke, who was an alien, had gone abroad in the year 1793, with an intention to return in four months, but had not returned; during his absence the defendant had kept house, and paid bills on her own account and in her own name. Lord *Kenyon*, C. J., said, this case came within the principle of the common law, where the husband had abjured the realm. If the husband had been absent for some time, and then returned, and paid bills contracted by the wife in his absence, and again left the kingdom, he should hold the defendant not liable; *but here was a desertion of the kingdom*, and an absence for some years; he was no longer domiciled here, and, *in the interval*, the wife was supplied with those articles; if she was not to be held liable for debts contracted under such circumstances, she might starve (g). Where the replication to a plea of coverture was, that the husband resided abroad, (not stating him to be an alien,) and that the defendant lived separate from him in this kingdom, that she traded as a feme sole, and plaintiff did not give credit to the husband, but traded with the defendant as a feme sole, and on her credit; the court held the wife chargeable as a feme sole (h). But it is conceived that such a replication could not be supported unless it appeared that the husband was an alien. "There is a great difference between the cases of an Englishman residing abroad, leaving his wife in this country, and of a foreigner so doing. The former may be compelled to return at any time by the king's privy seal. There is not any case in which the wife has been held liable, the husband being an Englishman." Per *Heath*, J. (i).

(e) *Carroll v. Blencow*, June 3, 1801, Sittings after East. T. C. B.; coram *Alvanley*, C. J., 4 Esp. N. P. C. 27.

(f) *Walford v. The Duchess de Pienne*, June 7, 1797, Middlesex Sittings, 2 Esp. N. P. C. 554.

(g) See, also, *Francks v. Duchess de Pienne*, 2 Esp. N. P. C. 587, to the same effect. But see *Kay v. D. de Pienne*, 3 Campb. 123, where Lord *Ellenborough* confines the preceding doctrine to the case, where the husband has never been

in this kingdom.

(h) *De Gaillon v. L'Aigle*, 1 B. & P. 357.

(i) *Marsh v. Hutchinson*, 2 Bos. & Pull. 226. See, also, *Farrer v. Countess of Granard*, 1 Bos. & Pul. N. R. 80, where *Heath*, J., said the case of *De Gaillon v. L'Aigle* proceeded much upon the ground of the defendant's husband being a foreigner. But see *Stretten v. Busnach*, 1 Bingh. N. C. 139, and *Burden v. De Keverberg*, 2 M. & W. 61.

The case of *Marsh v. Hutchinson* was an action for goods sold and delivered; the defence, coverture. The defendant's husband was an Englishman, who, about ten years before action brought, had purchased the appointment of agent for the English packets, at the Brill, in Holland, and had resided there ever since. During that period, he became possessed of madder-grounds, from the cultivation of which he derived considerable profit. On the irruption of the French into Holland, in 1795, his employment as agent having ceased, he sent the defendant, together with his family, to reside in England, but he remained in Holland to look after his madder-grounds, and with a view to recover his situation, in case the intercourse between England and Holland should be re-established. The defendant lived in Norfolk, and was there considered to be a married woman. The plaintiff had furnished her with coals, for the value of which this action was brought. It was held, under these circumstances, that the husband's residence in Holland did not enable the wife to bind herself by her own contracts. So where to a plea of coverture the plaintiff replied that the defendant's husband "lived and resided in Ireland, and that the defendant lived in this kingdom separate from her husband as a single woman, and as such single woman, promised, &c.," the replication was held bad on general demurrer, because the terms of it were perfectly consistent with a mere temporary absence, and they might be applied to the case of every man, who went for a short time to live in Ireland or Scotland, and whose wife in the mean time contracted debts here (*k*). So where to a plea of coverture the plaintiff replied, that before the cause of action accrued the defendant's husband became bankrupt, absconded without appearing to his commission, and continued to reside in foreign parts; on general demurrer, the replication was held bad; for, independently of the objection that this replication did not contain any express averment, that the defendant's promise was made during the absence of her husband, nor any equivalent allegation, it did not state such an involuntary absence of the husband, as, within the principle of former decisions, could affect her with the liabilities of a feme sole. It alleged no more than a temporary absconding (*l*). To trespass for breaking and entering the plaintiff's dwelling-house and shop on the 8th of April, 1807, and on divers other days, &c., and ejecting her from the possession thereof: defendant pleaded, that plaintiff at the time of committing the trespass, and thence continually hitherto, hath been, and still is, under coverture of one Jos. Boggett, then and still her husband, and still alive. Replication, that before the committing the trespasses, the husband deserted and left plaintiff, and departed out of this kingdom to parts beyond the seas, viz., to America, without leaving any means of necessary provision and support to plaintiff;

(*k*) *Farrer v. Countess of Granard*, 1 B. & Pul. N. R. 80.

(*l*) *Williamson v. Dawes*, 9 Bingh. 292.

and from the time of his departure hitherto, has not returned to this country, nor corresponded with or been heard of by plaintiff; and that during all that time, plaintiff has lived apart from her husband, and made contracts, and obtained credit as a single woman; and for her necessary support and maintenance has, during all that time, carried on the business of a merchant, as a single woman and sole trader, and as such was lawfully possessed of both dwelling-house and shop. Rejoinder, that the husband was born within this realm, and from the time of his nativity hitherto, has been and still is a subject of our Lord the King, and that he has not at any time hitherto abjured this realm, or been exiled or banished, or relegated therefrom. On demurrer, the court listened reluctantly to the argument in support of the replication, and gave judgment for the defendant on the authority of the preceding cases, observing, that the rule had been laid down in *Marshall v. Rutton*; it was capable of having exceptions engrafted on it, as where the absence is tantamount to a civil death, &c.; but that a temporary absence of the husband, not banished or the like, had never been deemed sufficient (*m*). The wife of an alien enemy cannot maintain an action in her own name, on a contract made either before or after coverture (*n*).

5. By the Divorce and Matrimonial Act (20 & 21 Vict. c. 85), s. 25, it is enacted, that "in every case of a judicial separation the wife shall, from the date of the sentence, and whilst the separation shall continue, be considered as a feme sole with respect to property of every description which she may acquire or which may come to her or devolve upon her (*o*), and such property may be disposed of by her in all respects as a feme sole; and, on her decease, the same shall, in case she shall die intestate, go as the same would have gone if her husband had been then dead; provided that if any such wife should again cohabit with her husband, all such property as she may be entitled to when such cohabitation shall take place, shall be held to her separate use, subject, however, to any agreement in writing made between herself and her husband when separate.

Sect. 26: "In every case of a judicial separation the wife shall, whilst so separated, be considered a feme sole for the purposes of contract and wrongs and injuries and suing and being sued in any civil court; and her husband shall not be liable in respect of any engagement or contract she may have entered into, or for any wrongful act or omission by her, or for any costs she may incur as plaintiff or defendant: provided that where upon any such judicial separation alimony has been decreed or ordered to be paid to the

(*m*) *Boggett v. Friar*, 11 East. 301.

(*n*) *De Wahl v. Braune*, 1 H. & N. 178; *S. C.* 25 L. J., Exch. 343.

(*o*) This provision applies to property

coming to her as executrix, administratrix, or trustee. See 21 & 22 Vict. c. 108, s. 7.

wife, and the same shall not be duly paid by the husband, he shall be liable for necessaries supplied for her use: provided, also, that nothing shall prevent the wife from joining at any time during such separation in the exercise of any joint power given to herself and her husband."

By sect. 21, power is also given to a wife deserted by her husband, to apply to a police magistrate or justice in petty sessions for protection as respects after-acquired property, who may make an order (*p*) protecting her earnings and property acquired since the commencement of such desertion, from her husband and all creditors and persons claiming under him; "and such earnings and property shall belong to the wife as if she were a *feme sole*." And by 21 & 22 Vict. c. 108, s. 6, the like power is conferred upon the judge ordinary of the divorce court.

An action cannot be maintained against one as the executor of a feme covert, although the ground of the action be goods furnished to her in the course of trade carried on by her as a feme sole, and though defendant may have possessed himself of goods to the amount of the demand, of which the woman was in possession as a feme sole (*q*).

III. Of Actions by Husband and Wife.

1. *Where the Husband and Wife must join*, p. 243.
2. *Where the Husband must sue alone*, p. 245.
3. *Where the Husband and Wife may join, or the Husband may sue alone at his Election*, p. 246.

1. *Where the Husband and Wife must join*.—In real actions for the recovery of land for the wife, the husband and wife must join (*r*). So in an action of waste, for waste committed on the land of the wife (*s*). So in detinue of charters of the wife's inheritance (*t*). In an action on a bond given to wife *dum sola*, husband and wife must join (*u*). But the husband may sue alone on a bill payable to the wife *dum sola*, but becoming due after marriage (*x*).

(*p*) This order should state the time of the desertion (21 & 22 Vict. c. 108, s. 9); and, if stated, is conclusive thereof, and, until reversal, protects all persons dealing with the wife as a *feme sole*. See sects. 8 & 10 of 21 & 22 Vict. c. 108.

(*q*) *Clayton v. Adams, Executor*, L. P. B. 107, Dampier MSS. L. I. L.; 6 T. R. 604, S. C.

(*r*) 1 Bulst. 21.

(*s*) 7 Hen. IV. 15 a.; 3 Hen. VI. 34.

(*t*) 1 Rol. Abr. 347, (R.) pl. 1.

(*u*) *Per Lord Hardwicke*, C. J., in *Bates Dandy*, 2 Atk. 208; 1 Rol. Abr. 347,

(R.) pl. 3. In *Milner v. Milnes*, 3 T. R. 631, Lord Kenyon said: "It is extremely clear on the one hand that marriage gives to the husband all the personal estate which the wife has in possession; it is also clear, on the other hand, that where a chose in action of the wife is to be reduced into possession, and it is necessary to bring an action for that purpose, it must be brought in the names of both husband and wife."

(*x*) *M'Neilage v. Holloway*, 1 B. & A. 218. See *Richards v. Richards*, 2 B. & Ad. 453; *Gaters v. Madeley*, 6 M. & W. 423.

Bond was given to wife during the coverture ; the wife died ; and then the husband sued upon the bond, as administrator to his wife ; it was held, on demurrer, that the action was well brought (*y*). Railway stock was bought by a married woman out of her own earnings, and was transferred in her name in the company's books ; it was held, that she could maintain an action against the company in her own name, subject to a plea in abatement. " We think," said *Jervis*, C. J., " that the plaintiff, though a married woman, by having become a registered shareholder of the company acquired, as a chose in action, a right to the dividends, which, unless controlled by her husband, would survive to her, and might have been unobjectionably put in suit by her and her husband jointly" (*z*).

If an action is brought in respect of a personal wrong to the wife, as for the battery of the wife, the husband and wife must join (*a*) ; so in an action for slander of the wife, she must join because she is the party slandered, and the husband must join for conformity (*b*). The declaration ought to conclude, " to their damage" (*c*), and not " to the damage of the husband" (*d*), for the damages will survive to the wife, if the husband die before they are received ; and a plea that the female plaintiff is not the wife of the male plaintiff is a good plea in bar (*e*). So where action is brought for *words* in themselves actionable, spoken of the wife, and no special damage laid, then such conclusion is right ; for the action survives (*f*) ; but in a case where special damage was laid for the loss of wages of the wife, it was held, that the husband and wife could not recover for such damage ; for as the profit of her wages is entirely his, he alone can sue for the loss of them (*g*). So where the wife was injured in consequence of the explosion of a lamp which the defendant had warranted, it was held, that the wife could not be joined in an action brought for such injury, because there was no misfeasance on the part of the defendant, independently of the contract which had been made with the husband alone (*h*). And where husband and wife sue on an account stated, the declaration must show that the accounting was concerning matters in which the wife had an interest (*i*).

By the Common Law Procedure Act, 1852, s. 40, " in any actions brought by a man and his wife for an injury done to the wife in

(*y*) *Day v. Padrone*, B. R. Trin. 13 & 14 Geo. II. MSS. 2 M. & S. 396, n. and Serj. Hill's MSS. vol. 27, p. 172.

(*z*) *Dalton v. Midland Counties Railway Company*, 13 C. B. 474 ; 22 L. J., C. P. 166.

(*a*) But in these cases the husband may sue alone for the injury sustained by himself from the loss of the society, comfort, and assistance of his wife, in consequence of the battery. *Hyde v. Scissor*, Cro. Jac. 538.

(*b*) *Dengate v. Gardiner*, 4 M. & W. 5.

(*c*) *Horton v. Byles*, 1 Sid. 387.

(*d*) Judgment arrested for this conclusion, in *Newton and Ux. v. Hatter*, Lord Raym. 1208.

(*e*) *Chantler v. Lindsey*, 16 M. & W. 82.

(*f*) *Grove and Ux. v. Hart*, Tr. 25 Geo. II. Bull. N. P. 7.

(*g*) *Dengate v. Gardiner*, 4 M. & W. 5.

(*h*) *Longmeid v. Holliday*, 6 Exch. 761.

(*i*) *Johnson v. Lucas*, 1 E. & B. 659 ; 22 L. J., Q. B. 174.

respect of which she is necessarily joined as co-plaintiff, it shall be lawful for the husband to add thereto claims in his own right; and separate actions brought in respect of such claims may be consolidated if the court or a judge shall think fit, provided that in the case of the death of either plaintiff such suit, so far as relates to the causes of action, if any, which do not survive, shall abate (*k*).

2. *Where the Husband must sue alone.*—Where the wife cannot maintain an action for the same cause, if she survive her husband, the action must be brought by the husband alone: as in the case of an action of *indebitatus assumpsit* for the labour, &c., of the wife, during the coverture (*l*); for, in contemplation of law, the wife is considered as the servant of the husband, and he is entitled to her earnings, and such earnings shall not survive to the wife, but go to the personal representative of the husband (*m*). By a settlement made on the marriage of the plaintiff and his wife, leaseholds were assigned upon trust to allow the wife to receive the rents and profits during her life to her separate use. The wife after marriage received the rents from the trustee, and lent a portion of them to the defendant; it was held, that the plaintiff might, after his wife's death, recover this money, *jure mariti*, from the defendant in an action for money lent (*n*). But where trustees for the separate use of the wife admitted that they held a certain sum to her separate use, but refused to pay it over without her separate receipt, it was held that an action for money had and received would not lie by the husband and wife for the sum so admitted to be due to her. "Here," said Lord *Denman*, "the defendants were not bound to pay the dividend which they had received to the wife's use, and indeed were bound to keep it for her until they obtained her authority in the form of her sole and separate receipt; their express duty being to secure her property against her husband" (*o*). So in an action on the case for words, not actionable in themselves, spoken of the wife, whereby the husband sustains special damage, the husband must sue alone (*p*). So, in actions for injuries committed during coverture to personal chattels (*q*), which by law are

(*k*) As to the powers of amendment in case of misjoinder, see C. L. P. Act, 1852, s. 222.

(*l*) *Buckley v. Collier*, Salk. 114, and Carth. 251.

(*m*) It may here be observed, that although the law will not imply a promise to the wife, yet where the wife is the meritorious cause of the action, that is, where the defendant has derived profit or advantage from her labour or skill, and an express promise of remuneration is made by the defendant to the wife, if, in such case, an action is brought by the husband and wife jointly, and it is expressly stated in the declaration, that the promise was made to the wife, an objec-

tion cannot be raised to such declaration, merely on the ground of the wife having been joined; because contracts made by the wife, with the assent of the husband, are valid, and the bringing the action in their joint names is a declaration of such assent; and in this case the action would survive to the wife. *Brashford v. Buckingham (in error)*, Cro. Jac. 77, 205.

(*n*) *Bird v. Pegrum*, 13 C. B. 639; 22 L. J., C. P. 166.

(*o*) *Bond v. Nurse*, 10 Q. B. 244.

(*p*) *Coleman and Wife v. Harcourt*, 1 Lev. 140, cited in *Saville and Wife v. Sweeney*, 4 B. & Ad. 514.

(*q*) *Arundel v. Short*, Cro. Eliz. 133.

vested in the husband ; as in trespass for cutting down and carrying away corn, although it grew upon the wife's land : for it grows by the industry of man, and consequently the property thereof is in the husband alone (r).

In all cases where the wife shall not have the thing when it is recovered, either solely to herself, or jointly with her husband, but the husband only shall have it, there the husband shall sue alone (s). An action on the case was brought by A. and B. his wife for the use and occupation of a messuage and lands, and for money had and received to the use of the husband and wife, stating the promises to husband and wife ; after judgment by default, writ of inquiry executed, and final judgment in B. R., a writ of error was brought in the Exchequer Chamber, assigning for error, that judgment was given for the husband and wife to recover their damages, whereas it appeared on the record that B. was the wife of A. and could not sustain any damage by reason of anything contained in the declaration ; the court were of opinion that the judgment was erroneous, because a contract could not be made with a married woman ; that a promise, either express or implied, did not give any interest to her ; the whole resulted to the husband, and the action ought to have been brought in his name. The counsel for the defendants in error having urged that, if an impossible assumpsit was stated in the declaration, it might quoad her be surplusage, as much as if she had been a stranger ; the court said, the insertion of the wife could not be surplusage, for it created an interest in her, and entitled her to damages by survivorship (t). Where a debtor to the wife as executrix promises to pay the husband in consideration of his giving time for payment, the husband ought to sue alone, because the wife is not a party to the agreement between her husband and the defendant (u) ; but in this case the life of the wife must be averred (x). *Note*.—The recovery by the husband will amount to a *devastavit pro tanto*. *Per Holt, C. J., Carth. 463* ; but *per Rokeby, J.*, assets at law.

3. *Where the Husband and Wife may join, or the Husband may sue alone at his Election*.—In personal actions for the recovery of damages only, (other than actions in respect of personal wrongs to the wife,) where the action will survive to the wife (y),

(r) *Willy v. Hanksworth*, B. R. M., 3 Geo. II. MSS., and cited by the court in *Weller v. Baker*, 2 Wils. 424.

(s) 1 Rol. Abr. 347, (Q.) pl. 5.

(t) *Bidgood v. Way and Wife*, on error in Exch. Chamb. 2 Bl. R. 1236, cited in *Morris v. Norfolk*, 1 Taunt. 214.

(u) *Yard v. Eland*, Lord Raym. 368 ; Salk. 117 ; *Longmeid v. Holliday*, ante, p. 244.

(x) *Lea v. Minne*, Yelv. 84 ; Cro. Jac. 110.

(y) In *Frosdike v. Sterling*, 1 Freem. 236, *North, C. J.*, said, "that he always took it for an unquestionable rule, that, wheresoever, in case the husband should die, the action would survive to the wife, there the wife *might* join, but on the other side, the husband may join the wife in many cases where he is not bound to join her, but may have the action alone." See also *Ayling v. Whicher*, 6 A. & E. 259 ; 1 Nev. & P. 416.

the husband and wife may join (*z*); or the husband may sue alone, for he alone may release such action (*a*).

Assumpsit.—In an action for a breach of promise made to husband and wife after coverture, to pay a sum of money to the wife, husband and wife may join (*b*). So where a promise is made to the wife only (*c*).

Action by husband for money had and received. Plea, by way of defence on equitable grounds that the money had been bequeathed by will to the separate use of the plaintiff's late wife, who, during the coverture, assigned the money to the defendant on trusts in which the plaintiff took no interest. It was held that the plea was good, admitting a receipt of the money *prima facie* to the use of the husband, and avoiding it by showing that in equity the receipt was on trusts in which the husband took no interest, thereby sufficiently negating any marital right arising on her death (*d*).

Covenant.—Where a lease is granted to husband and wife for a term of years, and the lessor ousts them, husband and wife may join in action of covenant (*e*). Queen Elizabeth, by letters patent, demised a house to A. for years, who covenanted to repair, and afterwards, during the term, the queen granted the reversion to husband and wife, and to the heirs of the husband in fee: the house being out of repair, the husband alone brought covenant, and it was held well, although the interest of the feme appeared on the face of the declaration (*f*). Covenant will lie by husband and wife for non-payment of rent, due by virtue of a lease granted by husband and wife of lands, the inheritance of wife (*g*). Husband alone may bring an action on a covenant made to himself and his wife, for, although the covenant be made to both, yet he may refuse quoad her (*h*). In this case, *North*, C. J., said, that he remembered an authority in an old book, that, if a bond be given to baron and feme, the husband shall bring the action alone, which shall be looked upon to be his refusal as to her (*i*).

Debt.—So if a bond be given to husband and wife administratrix, husband may sue alone, declaring on it as a bond to himself (*k*). In debt on bond made to husband and wife, both may

(*z*) *Per Cur.*, 2 Mod. 270.

(*a*) "What the husband alone may discharge, and of which he may make disposition to his own use, he may recover alone without joining his wife in the action." *Per Doddridge*, J., to which *Coke*, C. J., assented, and said it was a true and good ground, 3 Bulst. 164.

(*b*) *Hilliard v. Hambridge*, Aleyn, 36. See *Johnson v. Lucas*, 1 E. & B. 659; ante, p. 244.

(*c*) *Prat v. Taylor*, Cro. Eliz. 61; 1

Rol. Abr. 32, pl. 12.

(*d*) *Sloper v. Cottrell*, 6 E. & B. 497; 26 L. J., Q. B. 7.

(*e*) Bro. Baron and Feme, pl. 23.

(*f*) *Bret v. Cumberland*, Cro. Jac. 399; Buls. 163. But see *Middlemore v. Goodall*, Cro. Car. 505.

(*g*) *Aleberry v. Walby*, Str. 230.

(*h*) *Beaver v. Lane*, 2 Mod. 217.

(*i*) Cited by *Buller*, J., 4 Tr. 617.

(*k*) *Ankerstein v. Clarke*, 4 Tr. 616.

join (*l*) ; or the husband may disagree to the wife's right to the bond, and bring the action in his own name only (*m*) ; but, until such disagreement, the right to the bond is in both the husband and wife, and shall survive ; hence, if the husband dies, the wife shall have the bond, and not the personal representative of the husband (*n*). So in debt on bond made to the wife *during* coverture (*o*), or in assumpsit on a promissory note given to the wife *during* coverture (*p*), husband and wife may join : or husband may sue alone (*q*) ; but if the husband does not reduce his interest into possession during his lifetime, it will survive to the wife (*r*) ; but after the death of wife, husband must sue as administrator to his wife (*s*) ; for the rule of law is, that choses in actions can only be put in suit by the party to whom they are given ; or, after their deaths, by persons claiming *jure representationis*. Hence, if the husband, surviving his wife, does not, in his lifetime, reduce her choses in action into possession, although in equity those claiming under him are entitled to them, they must be recovered, not by his representatives, but the wife's ; and they will take the property as trustees for the representatives of the husband (*t*). A married woman, being administratrix, received a sum of money in that character, and lent it to her husband, taking in return for it the joint and several promissory note of her husband, and two other persons, payable to her with interest ; it was held, that although she could not have maintained any action upon the note during the lifetime of her husband, yet that, he having died, and the note having been given for a good consideration, it was a chose in action surviving to the wife, and that she might sue either of the other makers at any time within six years after the death of her husband, and recover interest from the date of the note (*u*). The assignees of a bankrupt may maintain an action in their own names only, for a chose in action belonging to the wife before marriage, *e. g.* a promissory note given to her *dum sola* ; and in such action, the defendant cannot set off a debt due to him from the bankrupt (*x*).

(*l*) 32 Edw. III. 5 ; 43 Edw. III. 10 ; Bro. Baron and Feme, pl. 14, 55.

(*m*) *Coppin v. —*, 2 P. Wms. 497.

(*n*) Bro. Baron and Feme, pl. 60.

(*o*) *Howell v. Maine*, [in the record, *Powell v. Mason*,] 3 Lev. 403, *S. P.* per Lord Hardwicke, 2 Atk. 208. See also *Nurse and Ux. v. Wills*, 4 B. & Ad. 739, judgment affirmed on error, 1 A. & E. 65.

(*p*) *Phillis Kirk and Wife v. Pluckwell*, 2 M. & S. 393.

(*q*) It appears by a MS. note, in the possession of a friend of the compiler, that the roll in *Howell v. Maine* was searched, and it was found that the bond was given to the wife *during* the cover-

ture ; for *devant*, therefore, in some editions of Levinz's Reports, read *durant*. Comyns has stated the case accurately in his digest, tit. "Baron and Feme" (W.)

(*r*) *Gaters v. Madeley*, 6 M. & W. 423.

(*s*) *Day v. Padrone*, B. R. Trin. 13 & 14 Geo. II. 2 M. & S. 396, n., and Serjt. Hill's MSS. vol. 19, p. 290, and vol. 27, p. 172.

(*t*) *Bells v. Kimpton*, 2 B. & Ad. 273.

(*u*) *Richards v. Richards*, 2 B. & Ad. 447, recognized in *Rose v. Poulton*, 2 B. & Ad. 822.

(*x*) *Yates v. Sherrington*, 11 M. & W. 42, recognizing *Miles v. Williams*, 1 P. Wms. 249, *post*, p. 252.

Where husband and wife have recovered judgment on a bond made to wife, *dum sola*, husband and wife may join in an action on such judgment; or husband may sue alone; for that which was before a chose in action, *transit in rem judicatam*, and is of another nature from what it was before the coverture (*y*). If it be referred to a master in Chancery to take an account of what is due to husband and wife, who reports the sum due, and appoints it to be paid to the husband, and the defendant is committed for non-payment, and escapes, the husband and wife may join in action against the warden for the escape (*z*).

Quare impedit.—So where a right of presentation is in the husband *jure uxoris*, a *quare impedit* may be brought by the husband and wife jointly (*a*). Or the husband may sue alone, for the presentation only is recoverable and not the advowson, and the release of the husband would bar the action (*b*).

Replevin.—Baron and feme may be joined in the same declaration in replevin for goods distrained from the feme *dum sola* (*c*). If the goods of a feme sole be taken, and she marries, the husband alone may sue the replevin (*d*). In the replevin of goods which the wife has as executrix, husband and wife shall join, *ut videtur* (*e*). Avowry for rent arrear *jure uxoris* may be by husband and wife, or husband only, averring the life of feme (*f*).

Tort.—In an action upon the case for stopping a way to the land of the wife, husband and wife may join (*g*). So an action upon the case for cutting down trees, the lops of which were reserved to the wife for her life, may be brought by husband and wife jointly (*h*). An action was brought by the dippers at Tunbridge Wells, together with their husbands, against the defendant for exercising the business of a dipper, not being duly appointed and approved according to a private statute; it was held, that the action was well brought in the names of the husbands and wives (*i*). But where lands were demised to husband and wife for years, and the husband had granted an underlease, it was held, that the husband might sue alone for damage done to the reversion (*k*).

Trespass.—Trespass was brought by the husband alone for hunting in a free warren, which he had in right of his wife, and it

(*y*) *Woolverston v. Fynnimore*, T. 18 & 19 Geo. II. C. B. MSS.

(*z*) *Huggins v. Durham*, Str. 726.

(*a*) Bro. Baron and Feme, pl. 41.

(*b*) *Ibid.* pl. 28.

(*c*) *Ibid.* pl. 85.

(*d*) F. N. B. 159, K., cited in Bull. N. P. 53.

(*e*) Bro. Baron and Feme, pl. 85.

(*f*) *Wise v. Bellent*, Cro. Jac. 442; Os-

borne v. Walleeden, 1 Mod. 273.

(*g*) Agreed in *Baker and Wife v. Brereman*, Cro. Car. 418.

(*h*) *Tregmiell and Wife v. Reeve*, Cro. Car. 437.

(*i*) *Weller and Wife and others v. Baker*, 2 Wils. 414.

(*k*) *Wallis v. Harrison*, 5 M. & W. 142.

was adjudged good, for damages only are recoverable (*l*). It is immaterial as to the point in question, whether the interest of the husband is a joint interest with the wife, or an interest only in right of the wife. In the first and second cases in covenant before abridged, the husband had a joint interest with the wife. In the fourth case in covenant, two first cases in tort, and the case to which this remark is annexed, the husband had an interest only in right of his wife.

Trover.—Where the inception of the cause of action is in the wife before marriage, and consummated afterwards, husband and wife may join, as in trover for a personal chattel of wife before, and conversion thereof after marriage (*m*). It must be observed, that, in all the preceding cases, where the wife is made a party, her interest ought to appear on the face of the declaration, for the court will not intend it upon demurrer (*n*), or even after verdict (*o*). *Sed quære*, whether this case be law to its full extent; for where husband and wife joined in replevin, and defendant avowed for rent arrear, after verdict, it was objected, that the husband and wife could not have a joint property in personal chattels, after the marriage, and consequently the replevin ought to have been brought by the husband alone. Lord *Hardwicke*, C. J., delivering the judgment of the court, said that, although the ground of the objection was generally true, yet, notwithstanding, as a man and woman might have a joint property before marriage, or the wife might have the goods in question as executrix, and the taking might in both cases be before marriage, the court were of opinion, that they might declare jointly in an action for such taking. That if the law would admit of such joint action, the fact was admitted by the pleading. The defendant had not disputed with the plaintiff to whom the property belonged at the time of the taking, and therefore, if there could be a case in which husband might join with the wife in an action for a personal chattel, the court thought that, *after verdict*, this ought to be intended to be the case: Bro. Bar. and Feme, pl. 85, abridges a book case in 33 Edw. III. (but which is not to be found in the "Year Book," and was probably taken from some manuscript), wherein it is held, that husband and wife may join for such things as the wife has as executrix, or where goods are taken from her whilst sole (*p*). A declaration in replevin by husband and wife, where nothing appears on the face of the record whence the court can infer that the wife had an interest in the goods taken, was bad, on special demurrer (*q*).

(*l*) Bro. Baron and Feme, pl. 16.

(*m*) *Blackborn v. Greaves*, 2 Lev. 107.

(*n*) *Serres v. Dodd*, 2 N. R. 405.

(*o*) *Abbott v. Blafield*, Cro. Jac. 644.

(*p*) *Bourne and Wife v. Mattaire*, Bull. N. P. 53, and MSS.

(*q*) *Serres and Wife v. Dodd*, 2 N. R. 405.

IV. *Of Actions against Husband and Wife.*

In actions against the husband for the debts of the wife contracted before marriage, if the wife is not joined, advantage may be taken of the omission in arrest of judgment (*r*), and this rule holds, although an account has been stated with the husband, for that does not alter the nature of the debt (*s*), and the judge at Nisi Prius has no power of any kind to enable him to add the name of the wife as defendant on the record (*t*). A woman occupied a house from Lady-day until the 8th of June, and then intermarried with the defendant and quitted the house, having on the Lady-day preceding given notice that she should quit at Michaelmas; an action for use and occupation from Lady-day to Michaelmas was afterwards brought against the husband; and it was held, that it would not lie; for there was no occupation by the husband for the former part of the half-year either in fact or in law (*u*). Assumpsit against husband and wife for goods sold and delivered to wife *dum sola*; promise by the wife: pleas, non assumpsit; non assumpsit by wife, *dum sola*, within six years; evidence for plaintiff, sale of goods by plaintiff to wife, *dum sola*, and payments by her within six years; for defendants: that they were married more than six years before action brought: nonsuit: *per Tenterden*, C. J. (*x*). To a declaration against husband and wife for debt due from the wife, before coverture, the husband's discharge under the Insolvent Act is a good plea (*y*); so also to a similar declaration is a plea, that the wife was discharged under the same act before coverture (*z*).

As a husband *de facto* is liable to the debts of his wife, a plea of *ne unques accouple en loyal matrimoine* to an action brought against husband and wife, for the recovery of a debt due from wife before coverture, is bad (*a*). A husband cannot be charged at law for money lent to his wife, even for the purpose of buying necessities; because it may be misapplied. If the money be laid out in necessities, equity will consider the lender as standing in the place of the person providing the necessities, and decree relief (*b*). But a count for money lent to the wife at the request of the husband, is good, because a loan to the wife at the request of the husband is considered in law as a loan to the husband (*c*). The

(*r*) *Mitchinson v. Hewson*, 7 T. R. 348.

(*s*) *Drue v. Thorne*, Aley, 72.

(*t*) *Garrard v. Giubelei*, 13 C. B. (N. S.) 832, in error.

(*u*) *Richardson v. Hall*, 1 Brod. & Bingh. 50.

(*x*) *Burt v. Stobart and Wife*, Middlesex Sittings, after M. T. 1 Will. IV. *ex relatione* Cresswell, counsel for defendant. See also *Neal v. Hollands*, 21 L. J., Q. B. 289.

(*y*) *Lockwood v. Salter*, 5 B. & Ad. 303.

(*z*) *Storr v. Lec*, 9 A. & E. 868; 1 P. & D. 633.

(*a*) *Norwood v. Stevenson*, Andr. 227.

(*b*) *Harris v. Lee*, 1 P. Wms. 432. Preced. in Chan. 502, S. C., and *Hutchinson v. Standly*, Lord Bathurst, C., H. T. 1776, MSS.

(*c*) *Stephenson v. Hardy*, 3 Wils. 388; 2 Bl. R. 872.

count, however, must state the money to have been lent to the wife at the request of the husband; for where the money was alleged to have been lent to the wife at the wife's request, it was held bad (*d*). "It is true that a complete or perfect contract cannot be made by a feme covert by her own authority; yet, by the assent of her husband, she may contract as his substitute, as in case either of sale or loan. This assent may be either express or implied; it may be prior or subsequent to the contract. If prior and communicated to the defendant, the contract made is an actual contract, and not merely *virtual* with the husband; if subsequent, then the wife's contract is *inchoate* and *imperfect*, until affirmed by the husband; and such affirmation, if given, transfers the contract to him." *Per Blackstone, J. (e)*. So where the plaintiff declared, that the defendant was indebted for meat, &c., found by the plaintiff at the defendant's request, and on evidence it appeared to be found for the defendant's wife, at his request, in his absence; upon a case reserved, it was held, that a delivery to the wife, at the husband's request, was in law a delivery to the husband (*f*). If a declaration against husband and wife, for a debt of the wife contracted before marriage, allege a promise of the wife, made after the marriage, to pay the debt, it is bad (*g*). If an action is brought against husband and wife on a bond given by the wife *dum sola*, the defendant may plead the bankruptcy of the husband after the intermarriage, &c., as a discharge of the debt (*h*). Husband and wife cannot maintain an action of trover, and allege the possession in them both; for the law transfers the whole interest to the husband: but trover may be maintained *against* husband and wife; for the gist of the action is the conversion, which is a tort, with which a feme covert may be charged, as well as with trespass (*i*). Where the injury is not of such a nature as must necessarily have been done by the husband alone, the wife may properly be joined (*k*). Hence husband and wife may be jointly sued in trespass for their joint act in assaulting and taking the plaintiff into custody on a false charge (*l*). Trespass against J. G., widow, and pending the suit she took husband; after judgment a writ was directed to the sheriff *quod caperet J. G. ad satisfaciendum*, upon which the sheriff took J. G., whose husband, together with her, thereupon brought an action for false imprisonment against the sheriff, who justified under the *ca. sa*. On demurrer, the court gave judgment for the defendant, observing, that if an

(*d*) *Stone v. Macnair (in error)*, 7 Taunt. 432.

(*e*) *Stevenson v. Hardie*, 2 Bl. R. 873.

(*f*) *Ross v. Noel*, Bull. N. P. 136.

(*g*) *Morris and Wife v. Norfolk and another*, 1 Taunt. 212.

(*h*) *Miles v. Williams*, 1 P. Wms. 249; said by Lord *Hardwicke*, in 2 Vesey, 181, to be truly reported, and recognized in

Yates v. Sherrington, 11 M. & W. 42; ante, p. 248.

(*i*) *Draper v. Fulkes*, Yelv. 165; *Anon.*, 1 Vent. 24.

(*k*) *Per Tindal, C. J.*, in *Vine v. Saunders and Ux.*, 4 Bingh. N. C. 101; 5 Sc. 359, recognizing *Bayley, J.*, in *Keyworth v. Hill*, 3 B. & A. 685.

(*l*) *Ib.* on demurrer to declaration.

action be brought against a feme, who before judgment takes husband, yet, if she be found guilty, the *ca. sa.* shall be awarded against her, and not against her husband (*m*). In like manner, after interlocutory judgment in assumpsit against a feme, who afterwards marries, the plaintiff, even after notice of the marriage, may proceed to final judgment, without joining the husband, and sue out execution thereon against the feme only; and such execution cannot be set aside for irregularity (*n*). So where an action is brought by a feme sole, who marries after the commencement of the suit but before trial, it is not necessary to sue out a *scire facias* to make the husband a party to the suit (*o*). Judgment was obtained against a feme sole, who afterwards married, and then the plaintiff brought a *sci. fa.* against husband and wife, and had judgment thereon: then the wife died, and the plaintiff afterwards brought another *sci. fa.* against the husband alone: it was held, on writ of error, that the second *sci. fa.* was well brought, on the ground that the judgment on the first *sci. fa.* had made the husband liable (*p*). In delivering the judgment of the Court of Exchequer in a recent case, *Pollock, C. B.*, said, "The wife is responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person, as for any other personal wrong. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, or the husband be sued for it together with the wife." Upon this ground it was held, that an action would not lie against husband and wife for a false and fraudulent representation by the wife, that she was sole and unmarried, whereby the plaintiffs were induced to take her promissory note as security for a loan to a third party (*q*). In an action against a husband and wife for a false and fraudulent representation by the wife that a bill of exchange drawn upon her husband was accepted by him, whereby the plaintiff was induced to discount such bill, it was held by *Erle, C. J.*, and *Byles, J.*, that these facts did not constitute a cause of action, and by *Williams, J.*, and *Willes, J.*, that they did, as the fraudulent representation was not shown to have been connected with any contract with the wife (*r*).

If slander be spoken by husband *and* wife, there must be separate actions, one against the husband only, for the slander spoken by him, and the other against the husband and wife, for slander spoken by the wife (*s*). So for words spoken of husband and wife

(*m*) *Doyley v. White*, Cro. Jac. 323.

(*n*) *Cooper v. Hunchin*, 4 East, 521.
See 3 M. & S. 557.

(*o*) *Walker v. Golling*, 11 M. & W. 78.

(*p*) *Obrian v. Ramm*, Carth. 30. See the Record, 3 Mod. 170.

(*q*) *Fairhurst v. Liverpool Adelpi Loan*

Association, 9 Exch. 422; 23 L. J., Exch. 163.

(*r*) *Wright v. Leonard*, 30 L. J. 365, C. P.

(*s*) *Swithin v. Vincent*, 2 Wils. 227; *Dyer*, 19, a, pl. 112, in the margin.

formerly there must have been two actions, one by the husband for the words spoken of the husband, and another by the husband and wife for the words spoken of the wife (*t*): but now such claims may be joined in one action, and if more than one action is brought, the actions may be consolidated (*u*).

The policy of the common law would not permit husband and wife to give evidence *for* each other, because their interests were the same; nor *against* each other, on account of the implacable dissension which might be occasioned thereby (*x*); but now, in all civil causes, except proceedings instituted in consequence of adultery, the husband and wife are compellable to give evidence for or against each other, but neither is compelled to disclose any communication made by the one to the other during marriage (*y*). The declarations of a married woman, during coverture, of the non-payment of money lent to her before marriage, are admissible in evidence for the plaintiffs, in an action brought against her husband as her administrator; for the wife, like any other person, may bind her representative (*z*). Feme covert, sued as feme sole, cannot bring error without her husband joining (*a*).

If husband and wife are taken in execution for a debt of the wife, she is entitled to be discharged, unless she has separate property, out of which she can pay the debt (*b*).

(*t*) *Errington v. Gardiner*, B. R. M. 22 Geo. III. MS. See *Smith v. Warner*, Goldsb. 76; *Dalby v. Dorthall*, Cro. Car. 553; *Anon.*, W. Jones, 440; *Smith v. Cooker*, W. Jones, 409.

(*u*) Common Law Procedure Act, 1852, s. 40, *ante*, p. 245.

(*x*) *Davis v. Dinwoody*, 4 T. R. 678; Bull. N. P. 286.

(*y*) 16 & 17 Vict. c. 83.

(*z*) *Per Lord Tenterden*, C. J., *Hamphreys v. Boyce*, 1 M. & Rob. 140.

(*a*) *Fisher v. M'Namara*, B. R., April 19, 1799, L. P. B. 279; Dampier, MSS. L. I. L.

(*b*) *Campbell*, C. J., in *Ivens v. Butler*, 26 L. J., Q. B. 145.

CHAPTER IX.

BILLS OF EXCHANGE AND PROMISSORY NOTES.

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I. *Of the Nature of a Bill of Exchange.*

A BILL of Exchange is a written order from A. to B., directing B. (who has, or is supposed to have, in his hands, sufficient effects belonging to A.) to pay a sum of money to C. or order, or to C. or bearer, either at sight or a certain number of days after sight, or after date, or at single, double, or treble usance, or on demand. The peculiar properties of a bill of exchange are these:—First,—It is assignable to a third person not named in the bill, or party to the contract, so as to vest in the assignee a right of action *in his own name*: contrary to the general rule of law, that choses in action are not so assignable. Secondly,—Although a bill of exchange be merely a simple contract, and not a specialty, yet it will be presumed that it has been originally given for a good and valuable consideration.

Bills of exchange are either foreign or inland: foreign bills of exchange have long been considered as the most convenient paper security among merchants, in conformity to the universal usages and customs established among traders, by unanimous concurrence, for facilitating a general commerce throughout the world (a). The person making the bill is called the *drawer*, the person to whom it is directed the *drawee* (b), and the person in whose favour it is made the *payee*. When the drawee has undertaken to pay the bill, he is styled the *acceptor*, and his undertaking to pay the bill is called an *acceptance*. No one can be liable as

(a) Postlethw. Dict. As to foreign bills of exchange, see Mercantile Law Amendment Act, 1856, ss. 6 and 7.

(b) As to the necessity of there being a drawee, see *Peto v. Reynolds*, 9 Exch. 410; 23 L. J., Exch. 98.

acceptor but the person to whom the bill is addressed (c), unless he be an acceptor for honour. Bills of exchange payable to order are assignable by indorsement. The person making an indorsement is called the *indorser*; the person in whose favour it is made the *indorsee*; the party in possession of the bill, and entitled to receive its contents, the *holder*: but not so if he only lends his name for the purpose of suing on it (d). Bills payable to bearer are transferable by delivery without indorsement (e). Where the drawee refuses to accept, a stranger, after protest for non-acceptance, may accept for the honour of the drawer, and thereby such stranger acquires certain rights, and subjects himself to the same obligations as if the bill had been directed to him. So a stranger may become a party to a bill, *paying* it after protest for non-payment, either for the honour of the drawer or indorsers. Although regularly there ought to be three persons concerned in a bill of exchange, *viz.*, drawer, drawee, and payee, yet there may be only two; that is, the characters of drawer and payee may be, and frequently are, united in the same person (f), as if A. draw a bill in this manner: "Pay to me or my order £ Value received by myself."

A bill of exchange is a simple contract (g), and consequently is within the Statute of Limitations; and must be sued for within six years after it becomes payable. In an action by an administrator, upon a bill of exchange payable to the testator, but accepted after his death, it was held that the Statute of Limitations begins to run from the time of granting the letters of administration, and not from the time the bill becomes due, there being no cause of action until there is a party capable of suing (h). An agent having money in his hands belonging to his principal, purchased with it a bill of exchange, which he indorsed specially to his principal; the latter, at the time of the indorsement, was dead, but that fact was not known to the agent; it was held, that the property in the bill passed to the administrator of the principal, and that he might, therefore, sue upon the bill in that character; it was held, also, that the administrator was only entitled to recover interest upon bills accepted after the death of the testator from the time of demand of payment made by the administrator, and not from the time the bills became due (i). If a note be payable by instalments, with a provision that if default be made in such payment the whole note shall become due, it seems that the statute would run from the time of the first default (k). Bills of exchange for value received are not such matters of account as are intended by

(c) *Per Lord Tenterden*, C. J., delivering judgment in *Polhill v. Walter*, 3 B. & Ad. 122. See stat. 6 & 7 Will. IV. c. 58, *post*, *Protest*.

(d) *Emmett v. Tottenham*, 8 Exch. 884.

(e) *Grant v. Vaughan*, 3 Burr. 15, 16.

(f) *Per Holt*, C. J., in *Buller v. Crips*,

6 Mod. 30.

(g) *Renew v. Aston*, Carth. 3.

(h) *Murray v. East India Company*, 5 B. & A. 204.

(i) *Ibid.*

(k) *Hemp v. Garland*, 4 Q. B. 519.

the exception in the Statute of Limitations concerning merchants' accounts (*l*).

A bill of exchange is to be paid as a simple contract debt; and constitutes *bona notabilia*, not as a bond or specialty in the place where the instrument is at the time of the deceased's death, but where the debtor resides (*m*).

II. Of the Capacity of the contracting Parties to a Bill of Exchange:—

Corporations, p. 258.

Infant, p. 261.

Feme Covert, p. 262.

Agent, p. 262.

Partners, p. 264.

Spiritual Person, p. 266.

All persons, whether merchants or not, if they have capacity to contract, may be parties to a bill of exchange. This appears from a case (*n*) in which it was decided, that the act of drawing a bill of exchange constituted the drawer a merchant, within the custom of merchants, so as to make him responsible to the holder upon non-payment.

Corporations.—The general rule is, that as a corporation is a body politic and invisible, it can only speak and act by its common seal (*o*); but on this general rule many exceptions have been grafted, and it has been held (*p*) that assumpsit will lie on a bill of exchange against a trading corporation, whose power of drawing and accepting bills is recognised by statute. But a railway company incorporated by a special act of Parliament containing the usual clauses cannot accept bills of exchange (*q*).

The stat. 7 & 8 Vict. c. 32, s. 27, continues to the Bank of England the privileges given or recognised by the stat. 3 & 4 Will. IV. c. 98, and by sect. 10 enacts, "that from and after the passing of this act no person other than a banker, who on the 6th day of May, 1844, was lawfully issuing his own bank notes, shall make or issue bank notes in any part of the United Kingdom." And by sect. 11, "that from and after the passing of this act it shall not be lawful for any banker to draw, accept, make or issue in England or Wales any bill of exchange or promissory note, or engagement for the pay-

(*l*) *Chevely v. Bond*, Carth. 226.

(*m*) *Yeomans v. Bradshaw*, Carth. 373.

(*n*) *Sarsfield v. Witherby*, Carth. 82.

(*o*) See *Gibson v. East India Company*, 5 Bingh. N. C. 269.

(*p*) *Murray v. East India Company*, 5 B. & A. 204. See *Broughton v. Manchester Water Works Company*, 3 B. & A. 1.

For further exceptions, see *ante*, p. 83.

(*q*) *Bateman v. The Mid Wales Railway Company; The National Discount Company (Limited) v. The Mid Wales Railway Company; Overend, Gurney, and Co. (Limited) v. The Mid Wales Railway Company*, 35 L. J. C. P. 205; L. R. 1 C. P. 499.

ment of money payable to bearer on demand; or to borrow, owe or take up in England or Wales any sums or sum of money on bills or notes of such banker payable to bearer on demand, save and except that it shall be lawful for any banker who was, on the 6th day of May, 1844, carrying on the business of a banker in England or Wales, and was then lawfully issuing in England or Wales his own bank notes, under the authority of a licence to that effect, to continue to issue such notes to the extent and under the conditions in the act mentioned, but not further or otherwise; and the right of any company or partnership to continue to issue such notes shall not be in any manner prejudiced or affected by any change which may hereafter take place in the personal composition of such company or partnership, either by the transfer of any shares or share therein, or by the admission of any new partner or member thereto, or by the retirement of any present partner or member therefrom: provided always, that it shall not be lawful for any company or partnership, now consisting of only six or less than six persons, to issue bank notes at any time after the number of partners therein shall exceed six in the whole." And by sect. 12, if any banker after the passing of the act becomes bankrupt, or ceases to act as a banker, or discontinues the issue of bank notes, he is disqualified from resuming such issue. And by sect. 26, from and after the passing of this act, it shall be lawful for any society or company, or any persons in partnership, though exceeding six in number, carrying on business of banking in London or within sixty-five miles thereof^(r), to draw, accept or indorse bills of exchange, not being payable to bearer on demand, notwithstanding the statute 3 & 4 Will. IV. c. 98, or any other statute.

"The right of one director of a joint-stock company to draw a bill upon the rest, and still further the power of one director to accept a bill for himself and the others so as to make those others liable, is not a right or power implied by law, like that which belongs to one member of an ordinary partnership in trade, with respect to bills drawn and accepted for the purposes of the trade; it must depend upon the powers given by the charter or deed or agreement under which the company is established and constituted, or some other agreement between the parties, whether a bill so drawn or accepted shall or shall not have that legal effect" (s).

By the act for the regulation of joint-stock companies (stat. 7 & 8 Vict. c. 110, s. 45) it is enacted, with regard to bills of exchange and promissory notes made, accepted or indorsed on the behalf or

(r) Joint Stock Banks are regulated by stat. 7 Geo. IV. c. 46, stat. 3 & 4 Vict. c. 111, and stat. 4 & 5 Vict. c. 113.

(s) *Per Tindal*, C. J., delivering judgment of court in *Bramah v. Roberts*, 3 Bingh. N. C. 972, recognizing *Dickenson v. Valpy*, 10 B. & C. 128. See *Bull v.*

Morrell, 12 A. & E. 745; *Fox v. Frith*, 10 M. & W. 131; *Harmer v. Steele*, 4 Exch. 1; *Macrae v. Sutherland*, 3 E. & B. 1; *Eduards v. Cameron Coal Company*, 6 Exch. 269; and *Thompson v. Wesleyan Newspaper Association*, 8 C. B. 849.

account of any company within the provisions of that act, so far as relates to the mode of making, accepting or indorsing the same, and to the liability of any such company thereon, that if the directors of the company be authorised by deed of settlement or bye-law to issue or accept bills of exchange or promissory notes, then every such bill of exchange or promissory note shall be made or accepted, as the case may be, by and in the names of two of the directors of the company on whose behalf or account the same may be so made or accepted, and shall be by such directors expressed to be made or accepted by them on behalf of such company; and that every such bill of exchange and promissory note so made or accepted as aforesaid shall be countersigned by the secretary or other appointed officer of the company in whose behalf the same is expressed to be made or accepted: and that every bill of exchange so made as aforesaid, or received by or on behalf of the company, may be indorsed in the name of the company by any officer authorised by deed of settlement or bye-law in that behalf; and that every such bill of exchange or promissory note so made, accepted or indorsed as aforesaid shall, immediately after the making, accepting or indorsing the same, be reported to the proper officer of the company on whose behalf the same shall have been made, accepted or indorsed, and such last-mentioned officer shall enter the same in proper books to be kept for that purpose; and that if any such bill of exchange or promissory note be not so reported and entered, then the officer, by whose default such bill or note shall not be so reported or entered, shall be liable to repay to the company the amount which the company shall pay, or be liable to pay, in respect of such bill or note: provided always, that nothing herein contained shall be deemed to make any such secretary or officer personally liable upon any such bill of exchange or promissory note, nor be deemed to make any such directors personally liable thereon, except as shareholders of the company; and that every such company on whose behalf or account any bill of exchange or promissory note shall be made, accepted or indorsed in manner and form aforesaid, shall and may sue and be sued thereon, as fully and effectually, and in the same manner, as in the case of any contract made and entered into under their common seal. An acceptance in this form—"A. and B., directors appointed by resolution to accept this bill," is an acceptance within this statute (t).

Of companies registered under the 19 & 20 Vict. c. 47, it is enacted by sect. 43, that bills and notes made, accepted or indorsed in the name of the company, or by any person acting under the authority of the company, expressed or implied, shall bind the

(t) *Halford v. Cameron Coal Company*, 20 L. J., Q. B. 160; *Eduards v. Cameron Coal Company*, 6 Exch. 269; see also *Thompson v. Wesleyan Newspaper Associ-*

ation, 8 C. B. 861; *Allen v. Sea Fire Life Assurance Company*, 9 C. B. 578; and *Aggs v. Nicholson*, 25 L. J., Exch. 348.

company. But by sect. 31, if any person on behalf of a limited company registered under the act, signs or indorses a bill, check or note, in which the name of the company is not duly mentioned, (and described as limited, sect. 5,) he is liable to a penalty of 50*l.*, and is made personally responsible to the holder. A promissory note in the following form: "Three months after date, we jointly promise to pay F. S. or order 600*l.* for value received in stock on account of the L. and B. Iron and Hardware Company, limited," signed by three of the directors of the company, has been held to be a note made in the name of the company within this statute, and therefore binding on the company, and not on the directors individually who signed it (*u*).

By s. 47 of Joint-Stock Companies Act, 1862 (25 & 26 Vict. c. 89), it is enacted that a promissory note or bill of exchange shall be deemed to have been made, accepted or indorsed on behalf of any company under this act if made, accepted or indorsed in the name of the company by any person acting under the authority of the company; or if made, accepted or indorsed by or on behalf or on account of the company by any person acting under the authority of the company.

It is to be observed, that although the statute 7 & 8 Vict. and statute 19 & 20 Vict. are repealed by the act of 1862, yet there is a saving clause that no repeal shall affect "any right or privilege acquired or liability incurred" under any repealed act (s. 206). And it has been held that the power of making contracts signed by their agent in pursuance of section 41 of the act of 1856 is a right or privilege acquired under that act (*x*).

Infant.—It was formerly held that an infant could not bind himself by a bill drawn in the course of trade (*y*), or even for necessities (*z*), but it now seems that an infant's contract on a bill or note is voidable only, and that his liability may be established by ratification after full age (*a*). Infancy is a personal privilege, of which the infant alone can avail himself. Hence it has been held, that the drawer of a bill of exchange cannot set up the infancy of the payee and indorser as a defence to the action (*b*). In like manner the *acceptor* of a bill of exchange cannot set up the infancy (*c*), or the bankruptcy (*d*), of the drawer as a defence to an action brought at the suit of the indorsee. So, though a note given by a wife to a husband is void, yet if it is indorsed over by

(*u*) *Lindus v. Melrose*, 27 L. J., Exch. 326; see also *Eastwood v. Bain*, 7 Week. Rep. 90; *Penrose v. Martin*, 28 L. J., 28 Q. B.

(*x*) *Prince v. Prince*, 1 L. R., Ch. 490.

(*y*) *Williams v. W. Harrison and R. Harrison*, Carth. 160.

(*z*) *Williamson v. Watts*, 1 Campb. 552, Sir J. Mansfield, C. J.

(*a*) Byles on Bills, 8th Edit. 54; *Haris v. Wall*, 1 Exch. 122.

(*b*) *Grey v. Cooper*, B. R. E. 22 Geo. III. M.S.; *S. C.* more fully reported, 3 Doug. 65.

(*c*) *Taylor v. Croker*, 4 Esp. N. P. C. 187; and *per* Lord Hardwicke, in *Haly v. Lane*, 2 Atk. 181.

(*d*) *Pitt v. Chappelow*, 8 M. & W. 616.

the husband, as between him and the indorsee, it is certainly good (*e*). And if a bill be accepted by a party after he is of full age, he will be liable, although the bill was drawn on him while an infant (*f*).

Feme Covert.—A feme covert cannot bind herself by drawing a bill of exchange. This proposition falls within the general rule of law, which permits married women to avoid all contracts made by them during their coverture. To this rule there are some exceptions, which are stated under title "Baron and Feme." The interest in a bill of exchange or note given to a feme covert, vests in her husband, and he must indorse it (*g*). Where a promissory note is given to a married woman, the husband may sue on it, in his own name only, and then a debt due to the maker from the wife *dum sola* cannot be set off (*h*). But if the husband die without having reduced it into possession, the note belongs to the wife, and not to the husband's executors, and she must bring the action (*i*). A promissory note made payable to a woman who is married at the time of the making, passes by the indorsement of the husband alone, during the coverture (*k*). If a promissory note is made payable to a married woman, and she indorses it for value in her own name, and the maker afterwards promises to pay it, in an action against him by the indorsee, it will be presumed, that the nominal payee had authority from her husband to indorse the note in that form, and the indorsement will be considered as vesting a legal title to the note in the plaintiff (*l*). So under the husband's authority she may indorse in her own name (*m*).

A husband may sue alone on a bill of exchange made payable to the wife *dum sola*, though she has not indorsed it; he reduces it into possession by bringing the action (*n*).

Agent.—Bills of exchange may be drawn, accepted, or indorsed, by means of the agent or attorney of the party. An agent or attorney for this purpose may be constituted by parol. In such case the principal is said to draw, accept, or indorse by procuration. The words "*per procuration*" are an express intimation of a special and limited authority; and a person who takes a bill so drawn, accepted, or indorsed, is bound to inquire into the extent of the authority (*o*), and he cannot maintain an action against the principal

(*e*) *Taylor v. Croker and Haly v. Lane*, *supra*.

(*f*) *Stevens v. Jackson*, 4 Campb. 164.

(*g*) *Barlow v. Bishop*, 1 East's R. 432.

(*h*) *Burrough v. Moss*, 10 B. & C. 558.

(*i*) *Betts v. Kimpton*, 2 B. & Ad. 273; *Howard v. Oakes*, 3 Exch. R. 136. As to what is a reduction into possession, see *Scarpellini v. Atcheson*, 7 Q. B. 864; and *Hart v. Stevens*, 6 Q. B. 937.

(*k*) *Mason v. Morgan*, 2 A. & E. 30.

(*l*) *Cotes v. Davis*, 1 Campb. 485.

(*m*) *Prestwick and another v. Marshall*, 7 Bingh. 565.

(*n*) *M'Neillage v. Holloway*, 1 B. & A. 218. See *Gaters v. Madeley*, 6 M. & W. 423; and *Hart v. Stephens*, 6 Q. B. 943.

(*o*) *Alexander v. Mackenzie*, 6 C. B. 766.

if the authority has been exceeded (*p*). Such an authority may be implied from circumstances (*q*).

Agents should be cautious how they accept bills directed to them personally, and not to their principals, although such direction describe them in their official characters; for in such case, if they accept in their own name, they will become personally responsible; as appears from the following case:—The plaintiff was indorsee of a bill of exchange, drawn from Scotland upon the defendant in these words, “At thirty days’ sight pay to J. S., or order, 200*l.*, value received of him, and place the same to account of the York Buildings’ Company, as per advice from Charles Mildmay. To Mr. Humphrey Bishop, cashier of the York Buildings’ Company, at their house in Winchester Street, London. Accepted per H. Bishop.” The bill not having been paid, an action was brought against defendant upon his acceptance: at the trial he proved, that the letter of advice was addressed to the company; and that, the bill having been brought to their house, defendant was ordered to accept it, which he did in the same manner as he had accepted other bills. *Page, J.*, directed the jury to find for the plaintiff; which they did accordingly. On motion for a new trial, the court held the direction right; “for the bill on the face of it imported to be drawn on the defendant, and it was accepted by him *generally*, and not as servant to the company, to whose account he had no right to charge it until actual payment by himself. And this being an action by an indorsee, it would be of dangerous consequence to trade, to admit evidence arising from extrinsic circumstances—as the letter of advice. *And this differed widely from the case of a bill addressed to the master, and underwritten by the servant: where undoubtedly the servant would not be liable, but his acceptance would be considered as the act of the master.* A bill of exchange is a contract by the custom of merchants, and the whole of that contract must appear in writing. In this case there was nothing in writing to bind the company, nor could any action be maintained against them upon the bill: for the addition of cashier to defendant’s name was only to denote the person with certainty; the direction to whose account to place it was for the use of the drawee only.” Judgment for the plaintiff (*r*). A promissory note was made in the following form: Midland Counties Building Society, No. 3. Birmingham, Sept. 1, 1856. One month after demand we jointly and severally promise to pay J. B. the sum of 120*l.*, with interest, &c. for value received.—(Signed) W. R. H. and S. D. S., trustees; W. D. F., secretary. “It was held that W. D. F. (the defendant) was personally liable on this note, and that the addition of the word ‘secretary’ to his signature did not cut down or ex-

(*p*) *Stagg v. Elliott*, 12 C. B. (N. S.) 873.

(*q*) See *Llewellyn v. Winckworth*, 13 M. & W. 598.

(*r*) *Thomas v. Bishop*, Str. 955; Ca. Temp. Hardw. 1. See also *Mare v. Charles*, 25 L. J., Q. B. 119; and *Court-auld v. Saunders*, 16 L. T. (N. S.) 562.

clude his liability, his signature being placed where a party usually signs such a document, and from its position showing nothing like a counter signature as 'secretary' merely" (s). Where the defendant, in the absence of his brother, who was liable to give the plaintiff a bill for goods supplied, signed it in his own name; it was held, that he was personally liable, the debt of a third person being a sufficient consideration for which a party may bind himself by bill, and the consideration need not be such as would enable the plaintiff to sue on a special contract (t). But where A. entered into and signed an agreement as agent of B., and B. shortly afterwards signed it with the words "I hereby sanction this agreement, and approve of A.'s having signed it on my behalf;" it was held that A. was not personally liable (u). An agent to a country bank to whom the plaintiff sent a sum of money in order to procure a bill upon London, drew in his own name, for the amount upon the firm in London, the two firms being the same: it was held, that the agent was liable as drawer, although plaintiff knew that he was agent, and supposed that the bill was drawn by him as such, and on account of the country bank, to which the agent paid over the money (x). A power of attorney authorising an agent to demand, sue for, recover, and receive by all lawful ways and means whatsoever, all monies, debts, dues whatsoever, and to give sufficient discharges, does not authorize him to indorse bills for his principals (y).

Partners.—By the custom of England, where there are joint traders, and one of them accepts a bill drawn on them *for himself and partner*, such acceptance binds all the partners, if it concerns the trade; otherwise, if it concerns the acceptor only, in a separate and distinct interest (z). The implied authority of one partner to bind another by bills of exchange is by the custom and law of merchants, and is confined to partnerships, other than mining and farming partnerships (a), for the purpose of trade: but there is no custom or usage that attornies shall be parties to negotiable instruments, nor is it necessary for the purposes of their business; hence, one of two attornies in partnership has no implied authority to bind his partner by a note in the name of the firm, though given for their debt (b). The authority implied by law, is an authority to bind the firm in the name of the partnership, and in that only: hence, where a firm consisted of J. B. and C. H., the partnership

(s) *Bottomley v. Fisher*, 31 L. J., Ex. 417.

(t) *Sowerby v. Butcher*, 2 Cr. & M. 368.

(u) *Spittle v. Lavender*, 2 Brod. & Bingh. 452.

(x) *Leadbitter v. Farrow*, 5 M. & S. 345.

(y) *Murray v. The East India Com-*

pany, 5 B. & A. 204; *Davidson v. Stanley*, 3 Scott's N. R. 49; 2 M. & Gr. 721.

(z) *Pinkney v. Hall*, Salk. 126.

(a) *Dickenson v. Valpy*, 10 B. & C. 128.

(b) *Hedley v. Bainbridge*, 3 Q. B. 316; 2 G. & D. 483.

name being "J. B." only, and C. H. accepted a bill in the name of "J. B. and Co.," it was held that J. B. was not bound thereby (c). If a bill of exchange is drawn upon a firm, and one of the partners accept it in his own name, this acceptance binds the partnership (d). So if A., B., and C., are in partnership, and A. draws a promissory note, by which he promises *individually* to pay the money, and which he signs with his own name only, but prefixing to his signature "*for A., B., and C.,*" this binds the whole partnership (e). Where there are several partners, it is competent to either of them, by his indorsement, in the name of the firm, to pass their interest in the bill (f); and such indorsement made by one partner for the satisfaction of his separate debt cannot be questioned in an action by the indorsee against the acceptor, without showing that the indorsement was at the time unknown to or unauthorised by the other partner (g). If a creditor of one of the partners collude with him to take security for his individual debt, out of the partnership funds, knowing at the time that it is without the consent of the other partners, it is fraudulent and void; but if it be taken *bonâ fide* without such knowledge at the time, no subsequently acquired knowledge of the misconduct of the partner, in giving such security, can disaffirm the act in the hands of the creditor, but it is valid in the hands of a *bonâ fide* holder (h). If a partner accepts a bill in the name of the firm, drawn upon him by his separate creditor on account of his separate debt, the presumption is that the bill is so accepted without the concurrence of the other partners, and that the creditor knows it (i). Where a bill of exchange accepted by a partner in the name of the firm includes a private debt as well as a debt due from the firm, the holder may, there being no fraud, sue upon it to the extent to which there is authority (k).

If a bill is sent into circulation after the dissolution of a partnership, all the partners must join in the indorsement, and one by putting the partnership name thereon cannot bind the rest; for the moment the partnership ceases, the partners become distinct persons; from that time they are tenants in common of the partnership property undisposed of (l). In like manner, after a secret act of bankruptcy committed by one of two partners, the other cannot, by an indorsement in the name of the firm, transfer the property in a bill which belonged to the firm before the bankruptcy; for the partnership having ceased to exist, the solvent partner is to be considered as tenant in common with the

(c) *Kirk v. Blurton*, 9 M. & W. 284; see *Forbes v. Marshall*, 11 Exch. 166; *MacLae v. Sutherland*, 3 E. & B. 1.

(d) *Mason v. Rumsey*, 1 Campb. 384.

(e) *Lord Galway v. Matthew*, 1 Campb. 403.

(f) *Swan v. Steele*, 7 East, 210; *Vere v. Ashby*, 10 B. & C. 296.

(g) *Ridley v. Taylor*, 13 East, 175.

(h) *Wiseman v. Euston*, 8 L. T. (N. S.) 637 C. P.

(i) *Levieson v. Lane*, 32 L. J., C. P. 10.

(k) *Ellston v. Deacon*, L. R. 2, C. P. 20.

(l) *Abel v. Sutton*, 3 Esp. N. P. C. 108, *Kenyon*, C. J.

assignees of the bankrupt partner, and the property in the bill can only be transferred by their respective indorsements (*m*). Where a bill was drawn on the firm of "J. K. and Co." under which firm the defendant and his partners had traded, and it appeared that there were other partnerships carried on under the same firm, in which the other drawers were concerned, but in which the defendant had no share; the defendant having offered to show that this bill was not drawn on account of the partnership in which he was concerned, but on account of one of the others, and that he knew nothing of it, Lord *Kenyon*, C. J., was of opinion that the defendant was nevertheless liable: he had traded with the other persons under that firm; any persons taking bills under it, though without his knowledge, had a right to look to him for payment (*n*).

Spiritual Person.—To assumpsit by the indorsee against the indorser of a bill of exchange, the defendant pleaded, that the bill was made and indorsed after the passing of the stat. 57 Geo. III. c. 99 (*o*), which restrained spiritual persons from being occupied in any trade or dealing; that the plaintiffs were a banking company, (the Northern and Central Bank of England,) of which certain spiritual persons, holding benefices, were partners; that the trade of a banker was carried on by the said partnership for the profit of those spiritual persons, as well as others, contrary to the form of the statute; it was held, on demurrer, that the trade of a banker was within the meaning of the statute, and consequently that the plea was good (*p*). The inconvenience likely to arise from this decision induced the legislature to interpose; and by stat. 1 & 2 Vict. c. 10, [20th Feb. 1837] certain contracts, by banking firms, were made valid, in cases of associations or corporations then formed, or which might be formed before the end of the next session of parliament, although any spiritual person might be partner. And now, by stat. 4 & 5 Vict. c. 14, after reciting that "divers associations and co-partnerships, consisting of more than six members or shareholders, have been formed for the purpose of carrying on the business of banking and other trades and dealings for gain and profit, and were then engaged in carrying on the same, by means of boards of directors or managers, committees, or other officers, acting on behalf of all the members or shareholders of or persons otherwise interested in such associations or co-partnerships; and that several spiritual persons, holding dignities, canonries, benefices, stipendiary curacies, or lectureships, have been members or shareholders of or otherwise interested in divers of such associations or co-partnerships, and that it was expedient to render legal

(*m*) *Ramsbottom v. Lewis*, 1 Campb. 279.

(*n*) *Baker v. Charlton*, Peake's N. P. C. 80. See *Ashby v. Vere*, 10 B. & C. 296; *South Carolina Bank v. Case*, 8 B. & C. 427.

(*o*) This act was repealed by stat. 1 & 2 Vict. c. 106; sects. 29 and 30 of this latter act contain the prohibitions now in force against spiritual persons trading.

(*p*) *Hall v. Franklin*, 3 M. & W. 259.

contracts entered into by such associations or co-partnerships, although the same may now be void, by reason of such spiritual persons being or having been such members or shareholders; it was enacted, that no such association or co-partnership already formed, nor any contract, either as between the members, partners or shareholders composing such association or co-partnership for the purpose thereof, or as between such association or co-partnership and other persons, heretofore entered into or which shall be entered into by any such association or co-partnership already formed or hereafter to be formed, shall be deemed to be illegal or void, or to occasion any forfeiture whatsoever, by reason only of any such spiritual persons as aforesaid being or having been a member, partner or shareholder of or otherwise interested in the same; but all such associations and co-partnerships shall have the same validity, and all such contracts shall be enforced in the same manner to all intents and purposes, as if no such spiritual person had been or was a member, partner or shareholder of or interested in such association or co-partnership: provided always, that it shall not be lawful for any spiritual person holding any cathedral preferment, benefice, curacy or lectureship, or who shall be licensed or allowed to perform the duties of any ecclesiastical office, to act as a director or managing partner, or to carry on such trade or dealing as aforesaid in person."

III. *Of the Requisites in a Bill of Exchange:—*

Stamp, p. 270.

Date, p. 274.

Alteration of Bill, p. 274.

Of the Person to whom the Bill is made payable, p. 277.

Words, "or Order," p. 277.

"Value received," p. 278.

Consideration, p. 278.

In order to prevent any mistake in the manner of penning this instrument, (although to constitute a bill of exchange there is not any precise form required (*q*),) a foreign and inland bill of exchange are subjoined in the proper form:—

Foreign Bill.

London, 1st January, 1841.

Stamp.

Exchange for 10,000 Livres Tournoises.

At two usances [*or* "at sight," *or* "after date"]
pay this my first bill of exchange (second and third of the same

(*q*) *Per Cur.* Lord Raym. 1397.

tenor and date not paid,) to Messrs. or order,
 [or "bearer,"] ten thousand Livres Tournoises, value received of
 them, and place the same to account as per advice from

JAMES OATLAND.

To Mr. in Paris, }
 payable at

Inland Bill.

£100.



London, 1st January, 1841.

At sight [or "on demand," "at days
 after sight," "at after date,"] pay to Mr.
 or order [or "bearer"] one hundred pounds, for value received.

SAMUEL SKINNER.

To Mr. merchant in }
 Bristol, payable at

An instrument in the following form was sued upon as a bill of exchange and as a promissory note:—"Four months after date pay to my order 200*l.* for value received, to Captain William Taylor." It was accepted by the defendant, but contained no date or drawer's signature, and was not indorsed. Held, that it was merely an inchoate instrument, capable of being perfected, but could not, until completed, be declared on either as a bill of exchange or promissory note (*r*).

The following document was held to be, if not a bill of exchange, at any rate a promissory note, if there was evidence of an absolute promise to pay it (*s*):

Exchange for £200.

At sight of this my third of exchange, the first and second of the same term and date being unpaid, please to pay to S. M. Peto, Esquire, or order, the sum of two hundred pounds sterling, for value received, and place the same, as by letter of advice of 3rd Sept., to the account of

Accepted Samuel Reynolds, Star Chamber, Sept. 3rd, 1852.

ALFRED RIGHTON.

But it was held that Clarke was not liable to be sued on the following document as acceptor (*t*):

(*r*) *M'Call v. Taylor*, 19 C. B. (N. S.) 301; 34 L. J., 365 C. P.

(*s*) *Peto v. Reynolds*, 9 Ex. 410.

(*t*) *Davis v. Clarke*, 13 L. J., 305 Q. B.

London, 8th March, 1838.

£100.

Twelve months after date pay to me or my order one hundred pounds, value received.

Accepted,
 H. Clarke,
 Payee at
 319, Strand.

JOHN HART.

To Mr. Hart.

An instrument which appears on common observation to be a bill of exchange may be treated as such, although words be introduced into it for the purpose of deception, which might make it a promissory note (*u*). The figures in the margin of a bill are not of the same authority as words in the body of the bill. Where, therefore, a bill of exchange was expressed in figures to be drawn for 245*l.*, but in words for “two hundred pounds:” it was held, that this was a bill for two hundred pounds, and being an *ambiguitas patens*, parol evidence was not admissible to show that the words “and forty-five” had been omitted by mistake (*v*). With respect to these bills of exchange, the following rules must be observed: A bill of exchange must *not* purport to be payable out of a particular fund, which may or may not be productive, or upon an event which may not happen; for it would perplex the commercial transactions of mankind, if paper securities were issued into the world encumbered with conditions and contingencies, and if the persons to whom they were offered in negotiation were obliged to inquire at what time these uncertain events would probably be reduced to a certainty (*x*). The following cases will illustrate this position:—An action was brought by payee against drawer of a written instrument in these words (*y*):—

“Seven weeks after the date pay A. B. £ out of *W. Steward's money as soon as you receive it.*”

It was objected, “that it was payable out of a supposed fund at a future time, which was uncertain, and might or might not happen.” The court gave judgment for the defendant; and *De Grey*, C. J., said, that the instrument or writing which constituted a good bill of exchange, according to the law and custom of merchants, was not confined to any certain form of words, yet it must have some essential qualities, without which it was not a bill of exchange; it must carry with it a personal and certain credit given to the drawer, not confined to credit upon any *thing* or *fund*; that the payee or indorsee took it upon no particular event or contingency, except the failure of the general credit of

(*u*) *Allan v. Mawson*, 4 Campb. 115; see *Lloyd v. Oliver*, 18 Q. B. 471.

(*v*) *Saunderson v. Piper*, 5 Bingh. N. C. 425.

(*x*) *Jenney v. Herle*, Lord Raym. 1361; *Stevens v. Hill*, 5 Esp. N. P. C. 247.

(*y*) *Dawkes and another v. Lord de Lorraine*, 3 Wils. 207; 2 Bl. R. 782, S. C.

the person drawing or negotiating the same. So where the instrument declared on was, "Pay A. B. one month after date £ on account of the freight of the *Veale Galley*." It was objected, that it was an order upon a particular fund, and on this ground, *Lee, C. J.*, ruled it not to be a bill of exchange (*u*). So where a bill was drawn by an officer upon his agent, requesting him to pay out of his growing subsistence, it was held not be good because the fund was uncertain (*x*). So a request to J. S. to pay £ out of the monies in J. S.'s hands (*y*), belonging to the proprietors of the Devonshire mines, was held not to be a bill of exchange, because it was uncertain whether the fund would be sufficient to pay it. So an order to pay money out of the fifth payment, when it should become due, and it should be allowed by the drawer (*z*). The same principle was recognised in the following case, although the instrument was held to be a good bill of exchange: J. S., on the 25th of May, 1724, drew a bill on (*a*) J. N., and directed him, one month after date, to pay A. B. or order £ as his quarter's half-pay, from 24th June, 1724, to 25th September following. The court were of opinion that this was a good bill of exchange, for it was *not* payable on a contingency *nor* out of a particular fund, and was made payable at all events; and was drawn upon the general credit of the drawer, not out of the half-pay; for it was payable as soon as the quarter began for the half-pay mentioned in the bill, which was not to be due till three months after: the mention of the half-pay was only by way of direction to the drawee, how he should reimburse himself.

Of the Stamp.—A bill of exchange cannot be given in evidence in an action (*b*), nor is it available as evidence of the contract, unless it be duly stamped, that is, not only with a stamp of the proper value, but also with a stamp of a proper denomination, or the peculiar stamp appropriated to this species of instrument by the legislature. The enactment of stat. 31 Geo. III. c. 25, s. 19, that no bill, draft, or order liable to the duties thereby imposed, shall be given in evidence, or admitted to be good, useful, or available in law, unless duly stamped, is incorporated in stat. 55 Geo. III. c. 184, s. 8 (*c*). The 19th section of this act prohibits the re-issuing a bill of exchange which has been paid, and a bill issued contrary to such prohibition is void (*d*). By 17 & 18 Vict. c. 83, s. 5, no person can recover on a foreign bill, or "make the same available for any purpose whatever," unless stamped as directed.

(*u*) *Banbury v. Lisset*, Str. 1212.

(*x*) *Josselyn v. Lacier*, 10 Mod. 294, 316; Fort. 281, S. C.; MS. Serjt. Hill, vol. 32, p. 1. See *Russell v. Powell*, 14 M. & W. 418.

(*y*) *Jenney v. Herle*, B. R. (*on error*) from C. B. Str. 591, and more fully reported in 8 Mod. 265; Lord Raym. 1361, and 11 Mod. 384, Leach's Edit.

(*z*) *Haydock v. Lynch* (*on demurrer*) to declaration, Lord Raym. 1563.

(*a*) *Macleod v. Snee*, Lord Raym. 1481; Str. 762, and 11 Mod. 400, Leach's Edit.

(*b*) 1 B. & P. N. R. 30, see *post*, p. 272.

(*c*) *Field v. Woods*, 7 A. & E. 114.

(*d*) *Lazarus v. Cowie*, 3 Q. B. 459; 2 G. & D. 487.

Notice of dishonour of a bill not drawn on a proper stamp is not necessary (*e*), for it is worth nothing.

Before the 10th of October, 1854, the amount of the stamp duties on bills of exchange was regulated by stat. 55 Geo. III. c. 184. Since that date other duties are substituted by stat. 17 & 18 Vict. c. 83; and by that statute and the 16 & 17 Vict. c. 50, the use of adhesive stamps on drafts or orders for the payment of money was introduced. The 21 Vict. c. 16, permits cheques to be drawn payable to order, and the 21 Vict. c. 20, imposes a stamp duty of one penny on all cheques indiscriminately. These statutes also contain provisions expressly preserving the effect of former enactments not inconsistent with them.

The following instruments are now exempt from duty:—Letters of credit. Bankers' drafts upon each other for clearing accounts (if not payable to bearer or order). Warrants for the payment of government annuities, dividends on stocks, and drafts of the Accountant General. Bank of England bills and notes. Notes for one pound, one guinea, two pounds and two guineas, payable to the bearer on demand, issued by the Bank of Scotland, Royal Bank of Scotland, or the British Linen Company in Scotland. Bills or notes issued by bankers paying a composition in lieu of stamps, pursuant to 9 Geo. IV. c. 23. Bills drawn for the expenses of the army or navy. Notes of loan societies and friendly societies (*f*).

The stamp duty is imposed upon the sum actually due at the time of taking the security, and not upon what may become due in future for the use of the money. Hence a promissory note for the payment of 30*l.* at three months after date, with interest from the date, requires a stamp applicable to a note not exceeding 30*l.* (*g*). So where a note reserves interest from a day prior to the date, a stamp applicable to the principal sum is sufficient (*h*).

By stat. 37 Geo. III. c. 136, s. 5, it is enacted, that bills and notes made after the passing this act, and liable to a stamp duty by stat. 31 Geo. III. c. 25, if stamped with a stamp of a different denomination than is required by the last-mentioned act, may, if the same be of *equal* or *superior* value to the stamp required, be stamped by the commissioners on payment of the duty and penalty; that is, by sect. 6th of the 37 Geo. III. c. 136, the penalty of forty shillings, if the bill or note is produced to the commissioners *before* it is payable, and ten pounds, if so produced *after* it is payable. But there is no provision for restamping bills or notes where the stamp is of too small a value. The 19th sect. of 31 Geo. III. c. 25, requires bills and notes to be stamped before made, and there is no enactment dispensing with this when the stamp is of too small a value (*i*). The act of 37 Geo. III. c. 136, is a clear legislative

(*e*) *Cundy v. Marriott*, 1 B. & Ad. 696.

(*h*) *Wills v. Noot*, 4 Tyrw. 726.

(*f*) See Byles on Bills, 95, 102, 8th Edit.

(*i*) *Chamberlain v. Porter*, 1 B. & P. N. R. 30.

(*g*) *Pruessing v. Ing*, 4 B. & A. 204.

declaration, that it is not sufficient, that a certain sum of money be paid on the instruments which are the subjects of taxation, but the stamp used must be of the proper denomination (*j*). By stat. 31 Geo. III. c. 25, s. 19, bills and notes were forbidden to be stamped after they were made, and unstamped bills and notes were not to be pleaded, given in evidence, or admitted to be good, useful, or available (*k*). This provision is incorporated in 55 Geo. III. c. 184, s. 8 (*l*), and is still in force. The 28th section of the Common Law Procedure Act, 1854, gives no power to put in evidence instruments that cannot be stamped after execution.

By stat. 43 Geo. III. c. 127, s. 6, it is enacted, that every instrument (*m*), matter, or thing, although stamped or impressed with any stamp of greater value than the stamp required by law, shall be valid and effectual, provided such stamp shall be of the denomination required by law for such instrument, &c.

An unstamped bill, or one improperly stamped, cannot be read to the jury as evidence of the contract, or any part of it, in respect of which the plaintiff sues (*n*). But an unstamped bill has been allowed to be given in evidence to negative by anticipation a plea of payment (*o*). And an unstamped instrument may now be admitted in any criminal proceeding (*p*).

Where partners resident in Ireland signed and indorsed a copper-plate impression of a bill of exchange, leaving blanks for the date, sum, time when payable, and name of the drawee, and transmitted it to B. in England for his use, who filled up the blanks and negotiated it; held, that this was to be considered a bill of exchange, by relation from the time of the signing and indorsing in Ireland, and consequently that an English stamp was not necessary (*q*). But where a blank acceptance was written on a stamped paper, which afterwards was filled up and became a bill of exchange, it was held that the bill could not be considered as existing by relation from the time of acceptance (*r*). A bill of exchange drawn in England upon a person abroad, but accepted by him, payable in England, is an inland bill, and requires a stamp as such (*s*).

Where it appeared that a bill, drawn on a proper stamp, was originally dated on the 2nd of September, 1793, payable *twenty-one* days after date; and, while it continued in the hands of the

(*j*) *Per* Sir J. Mansfield, C. J., delivering the opinion of the court in *Chamberlain v. Porter*, 1 B. & P. N. R. 33.

(*k*) See *Smart v. Nokes*, 7 Scott, N. R. 794.

(*l*) *Field v. Woods*, 7 A. & E. 114.

(*m*) See *Farr v. Price*, 1 East's R. 55, and *Taylor v. Hague*, 2 East's R. 414.

(*n*) *Jardine v. Payne*, 1 B. & Ad. 663.

(*o*) *Smart v. Nokes*, 6 M. & G. 911.

(*p*) 17 & 18 Vict. c. 83, s. 27.

(*q*) *Snaith v. Mingay*, 1 M. & S. 87, recognized by *Parke, J.*, *Holdsworth v. Hunter*, 10 B. & C. 456.

(*r*) *Abrahams v. Skinner*, 12 A. & E. 763; 4 P. & D. 358.

(*s*) *Amner v. Clark*, 2 Cr. M. & R. 468; 1 Gale, 191.

drawer, was altered with the consent of the acceptor, to be made payable *fifty-one* days after date, and afterwards with the like consent was again restored to *twenty-one* days after date, and the date brought forward from the 2nd to the 14th of September; the last alteration having been made on the 30th of September, the bill being then over due according to the original tenor of it; after these alterations, it was negotiated, and came into the hands of plaintiff: Lord *Kenyon*, C. J., nonsuited the plaintiff; and, on a motion to set aside the nonsuit, the court were clearly of opinion, that the nonsuit was proper; for that, at the time when the last alteration was made, the operation of the bill, as it originally stood, was quite spent; that it was a new and distinct transaction between the parties; *and that therefore there ought to have been a new stamp (t)*. The plaintiff declared as indorsee of a bill of exchange against the acceptor, and it appeared that the bill in question, which was drawn by Giles and Co. on the 3rd of June, 1807, payable to their own order, and accepted by the defendant at three months' date, was exchanged by him with Giles and Co., for their acceptance of a bill drawn by the defendant for the same sum at eighty-five days, payable to his order, the object being that Giles and Co. should put the defendant in cash before his acceptance became due. On the 23rd of June, before Giles and Co. or the defendant had passed the respective securities to any other person, it was agreed to procrastinate the payment of the bills by post-dating them the 23rd of June, instead of the 3rd. The court were of opinion, that the alteration rendered a new stamp necessary; observing that the delivery of the bill by the drawer to the acceptor, and the re-delivery of it for a valuable consideration, such as the exchange of acceptances, has been held to be, since *Cowley v. Dunlop (u)*, a negotiation of the bill; that the several drawers were mutual purchasers of each other's acceptances; and, as the alteration was made while the bill was in this course of negotiation, and after it had continued so twenty days (during which time it was in the power of the drawer and payee to have passed it to any third person), it was in effect drawing a new bill (x). So where a promissory note, payable by the defendant to the plaintiff or order, was originally expressed to be *for value received*, but the day after it had been signed and delivered by defendant to plaintiff, it was by consent of the parties altered, by the addition of the words *for the goodwill of the lease and trade of Mr. F. K. deceased*; it was held, that as the alteration was material, as well because it was evidence of a fact which, if necessary to be inquired into, must otherwise have been proved by different evidence, as also because it pointed out the particular consideration for the note, and put the holder upon inquiring,

(t) *Bowman v. Nicholl*, 5 Tr. 537.

(u) 7 T. R. 565.

(x) *Cardwell v. Martin*, 9 East, 190.
See also *Bathe v. Taylor*, 15 East, 412.

whether that consideration had passed, and as such alteration was made after the note had issued, a new stamp was necessary (*y*). An alteration made with the assent of the defendant, the acceptor, and before the bill was negotiated, has been held not to be a re-issuing, so as to require a fresh stamp (*z*). So where, after issuing of a joint and several note, the name of a third party was added, with consent of all parties, as an additional surety (*a*). An objection, on the ground of the insufficiency of the stamp, cannot be taken after payment of money into court (*b*). At the trial the objection should in general be taken before the instrument is read. If the judge rule against the objection, his decision cannot be reviewed, nor ought he to reserve the point (*c*).

Omission of Date.—Regularly, every bill of exchange ought to be dated: but in the following cases, where the day of the date was omitted in the declaration, the court said they would intend the bill to bear date on the day when it was made. A date is not of the substance of a deed, for if it want a date, or have a false or impossible date, as the 30th of February, yet the deed is good (*d*). Case on a foreign bill of exchange payable at double usance from the date, and it was alleged that the party beyond the sea drew the bill on a certain day, and that the same was presented to and accepted by the defendant. Exception that the date of the bill was not set forth. The court said, that they would intend the bill dated at the time of drawing it. Judgment for plaintiff (*e*). In an action by the payee against the maker of a promissory note, dated the 28th of June, 1837, the plaintiff in his particulars gave credit for the payment of three years' interest on account. It appeared that the note was made in 1839; it was held, that the bill of particulars had reference to the date of the note, and therefore that the interest became payable from the year 1837, and not from the year 1839, when the note was actually made (*f*). In the case of a bill dated on a Sunday, the court, in the absence of evidence, would not presume the acceptance to have been written on that day; and even if it had, such an act would not be an act of ordinary calling within stat. 29 Car. II. c. 7 (*g*). Parol evidence is admissible to show from what time an undated bill was intended to operate (*h*).

Alteration of Bill.—A bill of exchange, or any other executory written contract, is avoided by an alteration in a material part,

(*y*) *Knill v. Williams*, 10 East, 431.

(*z*) *Leykariiff v. Ashford*, 12 Moore, 281.

(*a*) *Catton v. Simpson*, 3 Nev. & P. 248; 8 A. & E. 136. But see *Gardner v. Walsh*, 5 E. & B. 83.

(*b*) *Israel v. Benjamin*, 3 Campb. 40.

(*c*) 17 & 18 Vict. c. 125, s. 31; *Stordel v. Kuczinski*, 17 C. B. 251.

(*d*) *Goddard's case*, 2 Co. 5, a.

(*e*) *De la Courtier v. Bellamy*, 2 Show. 422; *Hague v. French*, Exchequer Chamber (*in error*), 3 B. & P. 173.

(*f*) *Cheetham v. Sturtevant*, 12 M. & W. 515.

(*g*) *Begbie v. Levi*, 1 Cr. & J. 180.

(*h*) *Davis v. Jones*, 25 L. J., C. P. 91.

although such alteration is made by a stranger (*i*). A bill of exchange was drawn on defendant on the 26th March, 1788, payable three months after date to J. S. and accepted by defendant. *After acceptance*, and while the bill remained in the hands of J. S. the payee, the date of the bill was altered by some person unknown, from the 26th March, 1788, to the 20th March, 1788, without the authority or privity of defendant: J. S. the payee, afterwards indorsed the bill so altered to the plaintiffs for a valuable consideration. It did not appear that plaintiffs knew of the alteration at the time when the bill was indorsed to them. Payment having been refused, plaintiffs sued the defendant as acceptor. The declaration contained two special counts, one on a bill dated the 20th March, 1788, the other on a bill dated the 26th March, 1788, and the money counts. Special verdict. The case was argued twice in B. R., after which the court (*Buller, J.*, dissentient) gave judgment for defendant, on the ground that the alteration of the instrument had avoided it (*k*). So if the word "date" be inserted, instead of the word "sight" (*l*). So where a bill having been accepted generally, the drawer, without the consent of the acceptor, added the words "payable at Mr. B's, Chiswell Street" (*m*); and this is the case though the plaintiff be an indorsee for value, who took the bill *bonâ fide* and without knowledge of the alteration (*n*). So the addition of the words "interest to be paid at 6 per cent. per annum," written at the corner of the note, and not in the body, is a material alteration avoiding the note (*o*).

But a mere correction of a mistake, as by inserting the words "or order," in furtherance of the intention of the parties, will not vitiate the bill (*p*). So where two persons, being jointly indebted to another, agreed to give him a bill of exchange, to be drawn by one of the debtors, and accepted by the other, instead of which they sent him a promissory note, made by the one and indorsed by the other, which he immediately returned to be altered into a bill of exchange, which was done accordingly: it was held, that such alteration, only fulfilling the terms of the agreement, might be considered as the correction of a mistake, and did not render a new stamp necessary, the instrument never having been negotiated as a promissory note (*q*). So if the alteration be not in the time of payment, sum, &c., or other material part, the bill will not be affected by it. Hence, writing on the bill the place where it was to be paid, before the bill was negotiated, at the request of the

(*i*) *Davidson v. Cooper*, 11 M. & W. 778, affirmed on error, 13 M. & W. 343.

(*k*) *Master v. Miller*, 4 T. R. 320, affirmed on error, 2 H. Bl. 141.

(*l*) *Long v. Moore, Kenyon*, C. J., 3 Esp. N. P. C. 155.

(*m*) *Cowie v. Halsall*, 4 B. & A. 197.

(*n*) *Birchfield v. Moore*, 23 L. J., Q. B.

261; and see also *Gardner v. Walsh*, 5 E. & B. 83.

(*o*) *Warrington v. Early*, 23 L. J., Q. B. 47.

(*p*) *Byrom v. Thompson*, 11 A. & E. 31.

(*q*) *Webber v. Maddocks*, 3 Campb. 1. See *Cole v. Parkin*, 12 East, 471.

payee, has been held not to destroy the validity of the bill (*r*). Where the acceptor had made the bill payable at his own house, and some time after delivery to payee, at the request of payee, altered the place of payment to a bankers; it was held to be immaterial (*s*). Three persons joined as drawer, acceptor, and first indorser, in making an accommodation bill; and it was afterwards issued for value to J. S. Previously to its being issued, its date had been altered: it was held, that the acceptor, having assented to the alteration when he was informed of it, it was no answer to an action on the bill against him, that the bill had been so altered without the consent of the drawer and first indorser, and that a fresh stamp was not necessary in consequence of such alteration, the bill having been altered before it was issued in point of law. An accommodation bill is not issued until it is in the hands of some person who is entitled to treat it as a security available in law (*t*).

But in all these cases it lies on the plaintiff to show that the alteration was made previous to the note being issued (*u*); and where an alteration appears upon the face of a bill, the party producing it must show that the alteration was made with consent of parties, or before issuing the bill (*x*). Where the words "or order" had been substituted for "or other," and the attesting witness, who had prepared the note, stated that he could not say whether the alteration was in his handwriting or not, but that he ought to have drawn the note originally with the words, "or order," and it appeared that the defendant had paid two years' interest on the note; this was held to be reasonable evidence, from which it might be inferred that the alteration had taken place with the defendant's consent (*y*). If, upon a bill being presented for acceptance, the drawee alters it as to the time of payment, and accepts it so altered, if the holder acquiesces in such alteration and acceptance, the bill will be good as between these parties (*z*). But if, after a bill has been drawn and indorsed, and before it is accepted, the drawee alter it by postponing the time of payment, it renders the bill void (*a*). So where a bill was delivered by the drawee to the payee, and afterwards its date was altered by an agreement between the payee and drawee before acceptance, in an action by payee against acceptor, it was held void, for it was negotiated when delivered by the drawee to payee, and therefore required a fresh stamp (*b*). But where drawer sues acceptor upon

(*r*) *Trapp v. Spearman*, *Kenyon*, C. J., and see *Fanshawe v. Peet*, 26 L. J., Ex. 314.

(*s*) *Walter v. Cubley*, 2 Cr. & M. 151; 4 Tyrw. 87.

(*t*) *Downes v. Richardson*, 5 B. & A. 674.

(*u*) *Johnson v. Duke of Marlborough*, 2 Stark. 313.

(*x*) *Per Best*, C. J., in *Henman v.*

Dickinson, 5 Bingh. 184; see also *Knight v. Clements*, 8 A. & E. 215; *Clifford v. Parker*, 2 M. & Gr. 909; 3 Scott's N. R. 233.

(*y*) *Cariss v. Tattersall*, 2 M. & Gr. 890; 3 Scott's N. R. 257.

(*z*) *Paton v. Winter*, 1 Taunt. 420.

(*a*) *Outhwaite v. Luntley*, 4 Campb. 179.

(*b*) *Walton v. Hastings*, 4 Campb. 223.

a bill and fails, in consequence of having altered the bill in a material part, he may still recover on the counts on the original consideration (c). A cancellation by a third person, through mistake, of an acceptance will not avoid the bill (d).

Of the Person to whom the Bill is made payable.—Regularly a bill of exchange ought to be made payable to a real person; but if it be drawn payable to a fictitious payee or order, and indorsed in his name, *by concert between the drawer and acceptor*, it will be considered as a bill payable to bearer, and may be declared on as such in an action by an innocent indorsee for a valuable consideration against the drawer (e). J. P. having died possessed of certain goods, on which the plaintiff had some claim, the defendant was allowed by the plaintiff to take possession of the goods on giving an acceptance for their value, and by arrangement between them a bill was drawn and indorsed to the plaintiff by procuration, in the name of the deceased J. P., and accepted by the defendant. In an action by the plaintiff on the bill it was held, that he was precluded from setting up that the indorsement was not J. P.'s (f). In one case it was held, that if the circumstance of the payee being a fictitious person is unknown to the acceptor, he cannot be declared against on the bill, either as a bill payable to bearer, or to the order of the drawer (g). But it has since been decided that the acceptor *suprà protest* of a bill of exchange for the honour of the drawer is like the drawer himself estopped from denying that the bill is a valid bill, and consequently it is not competent for him to set up as a defence to an action against him by an indorsee that the payee is a fictitious person, and that he was ignorant of the fact at the time he accepted the bill (h). Where the drawer subscribed himself as Thomas Wilson, when his name was Thomas Wilson Richardson; it was held, that he was not to be esteemed to have committed a forgery, unless it were proved that the omission of his surname was for purposes of fraud (i). If the payee be a person to be ascertained *ex post facto*, the bill will be invalid (k).

Words, "or Order."—The negotiability of a bill of exchange depends on its being made payable to A. or order, or to A.'s order, or to A. or bearer. See *post*, on the transfer of bills of exchange. A bill payable to A.'s order is the same as if it were made payable to A. or order (l), and may be declared on, without alleging that

(c) *Atkinson v. Hawdon*, 2 A. & E. 628.

(d) *Raper v. Birkbeck*, 15 East, 17. See *Novelli v. Rossi*, 2 B. & Ad. 757.

(e) *Collis and others v. Emett*, 1 H. Bl. 313; or against the acceptor; *Gibson and another v. Minet and another*, 1 H. Bl. 569. But see contr. the opinions of *Eyre*, C. J., and *Heath*, J., 1 H. Bl. pp. 598, 625, with whom Lord *Thurlow*, Ch., concurred.

(f) *Aspital v. Bryan*, 32 L. J., Q. B. 91, 5 B. & S. 73, in error.

(g) *Bennett v. Farnell*, 1 Campb. 130.

(h) *Phillips v. Im Thurn*, 18 C. B. (N. S.) 694.

(i) *Schultz v. Astley*, 2 B. N. C. 544.

(k) *Storm v. Stirling*, 23 L. J., Q. B. 298; 3 E. & B. 832.

(l) *Per Holt*, C. J., 12 Mod. 310.

A. did not make any order for the payment of the bill to any other person (*m*). In an action by indorsee against payee, exception was taken that a bill was payable to defendant only, without the words, "or his order;" and therefore not assignable by the indorsement; and *Holt*, C.J., agreed that the indorsement of this bill did not make *him that drew* the bill chargeable to the indorsee; for the words "or his order," give authority to the defendant to assign it by indorsement; and it is an agreement by the first drawer that he would answer it to the assignee; but the indorsement of a bill which has not the words "or his order," is good, or of the same effect between the indorser and indorsee, to make the indorser chargeable to the indorsee (*n*).

"*Value received*."—The essence of a bill of exchange is, that it is negotiable or payable to order, and that it is payable generally, not out of a particular fund. It is not necessary to insert the words "value received" (*o*).

Consideration.—A bill of exchange is *presumed* to be made upon a good and valuable consideration; and in actions not between immediate parties some suspicion must be cast on the plaintiff's title before he can be compelled to prove what consideration he has given for it. But when suspicion is cast on the plaintiff's title, by showing that the bill is connected with some fraud, and a suspicion of fraud be raised from its being shown that something has been done with it of an illegal nature, as that it has been clandestinely taken away or has been lost or stolen; in such cases the holder must show that he gave value for it (*p*). In actions between immediate parties, the illegality or want of consideration may be insisted on by way of defence to an action on the bill. "As between the drawer and payee, the consideration may be gone into, yet it cannot between the drawer and indorsee; and the reason is, because it would be enabling either of the original parties to assist in a fraud;" *per Ashhurst*, J. (*q*). But the want of consideration between drawer and acceptor is no defence to an action at the suit of indorsees for value, unless they take the bill with notice of the want of consideration (*r*), and the *onus probandi* lies upon the defendant (*s*).

By stat. 9 Ann. c. 14, s. 1, All notes, *bills*, &c., where the whole or any part of the consideration was for money or any other valuable thing, won by gaming, &c., were made void, as by stat. 16 Car. II. c. 7, certain gaming contracts were; and the consequence of these enactments was, that even an innocent indorsee could not

(*m*) *Smith v. M'Clure*, 5 East, 476.

(*n*) *Hill v. Lewis*, Salk. 133.

(*o*) *White v. Ledwick*, 4 Dougl. 247;
Hatch v. Trages, 11 Ad. & E. 702.

(*p*) *Mills v. Barber*, 1 M. & W. 425;
and see *Smith v. Braine*, 16 Q. B. 244;

Hall v. Featherstone, 27 L. J., Exch. 308.

(*q*) *Lickbarrow v. Mason*, 2 T. R. 71.

(*r*) *Robinson v. Reynolds*, 2 Q. B. 196;
1 G. & D. 526.

(*s*) *Mills v. Barber*, 1 M. & W. 425;

maintain an action in any of those cases which fell within their provisions (t).

By stat. 5 & 6 Will. IV. c. 41, intituled "An Act to amend the Law relating to Securities given for Considerations arising out of Gaming, usurious (u) and certain other illegal Transactions," after reciting clauses in the foregoing and other statutes against gaming, usury, &c., it is enacted, that so much of the recited acts as enacts, that any *note, bill, or mortgage*, shall be absolutely void, shall be repealed: and that such *note, bill, or mortgage*, which under those acts would have been absolutely void, shall be deemed and taken to have been made for an *illegal consideration* (x); and the said several acts shall have the same effect which they would respectively have had if, instead of enacting that such *note, bill, or mortgage*, should be absolutely void, they had provided respectively that every such *note, bill, or mortgage*, should be deemed to have been made for an *illegal consideration*, with a proviso that this statute shall not affect any *note, bill, or mortgage*, which would have been good, if this act had not passed: and by sect. 2, in case any person shall, after the passing of this act, make, draw, give, or execute any note, bill or mortgage for any consideration on account of which the same is by any of the recited acts declared to be void, and such person shall actually pay to any indorsee, holder or assignee of such note, bill or mortgage, the amount of the money thereby secured, or any part thereof, such money so paid shall be deemed to have been paid for and on account of the person to whom such note, bill or mortgage was originally given upon such illegal consideration, and shall be deemed to be a debt due from such last-named person to the person who shall have so paid such money, and shall be recoverable by action in any of his Majesty's courts of record. This statute does not mention judgments (y).

The stat. 16 Car. II. c. 7, and so much of the stat. 9 Ann. c. 14, as was not altered by the stat. 5 & 6 Will. IV. c. 41, are now repealed by the stat. 8 & 9 Vict. c. 109, s. 15, the 18th section of which enacts, that all contracts or agreements, whether by parol or in writing, by way of gaming or wagering, shall be null and void (z). It would seem that the effect of s. 15 of this latter statute is, that notes, bills, and mortgages given upon gaming considerations are left as altered by stat. Will. IV. Hence, a bill of ex-

(t) *Bowyer v. Bampton*, Str. 1155; *Shillito v. Theed*, 7 Bingh. 405.

(u) The statute 17 & 18 Vict. c. 90, passed the 10th August, 1854, repeals the laws against usury, but provides that nothing therein contained shall affect acts done previously to the passing of that act.

(x) See *Edmunds v. Groves*, 2 M. & W. 642; *Applegarth v. Colley*, 10 M. & W.

731; *Bingham v. Stanley*, 2 Q. B. 117; 1 G. & D. 237; and *Carter v. James*, Exch. T. T. 1844, where *Alderson, B.*, said he was the only survivor of the judges who decided *Edmunds v. Groves*, and that it could not be supported.

(y) See *Lane v. Chapman*, 11 A. & E. 966, affirmed on error, 11 A. & E. 980.

(z) See *Fitch v. Jones*, 24 L. J., Q. B. 293; 5 E. & B. 238, see p. 109.

change given for a gaming debt is now void, except in the hands of *bonâ fide* holders without notice (a).

A plea to an action by drawer against acceptor, that the bill was given for goods sold by the plaintiff, a foreigner, to the defendant, for less than the real value, to be smuggled into this kingdom, was held bad, on special demurrer, a foreigner not being bound to respect the revenue laws of this country (b).

A bill may be negotiated after it is due, unless there be an agreement for the purpose of restraining it; and the party who takes a bill for a good consideration, after it becomes due, is not precluded from suing the acceptor by the circumstance of the bill being an accommodation bill (c). It was said by *Buller, J.*, that generally, when a note is due, the party receiving it takes it on the credit of the person who gives it to him (d). To this position *Kenyon, C. J.*, agreed, with the addition of this circumstance, that it must appear on the face of the note to have been dishonoured, or knowledge be brought home to the indorsee that it had been so (e). In another case (f), *Buller, J.*, said, that it had never been determined that a bill or note was not negotiable after it became due, but if there were circumstances of fraud in the transaction, and it came into the hands of plaintiff by indorsement, after it became due, he had always left it to the jury, upon the slightest circumstance, to presume that the indorsee was acquainted with the fraud. And where the holder of a note had given a full consideration for a note after it became due, but was not permitted to recover in an action against the maker, the maker having proved that the note was originally made without consideration; Lord *Ellenborough, C. J.*, observing, "That after a note or bill is due, it comes disgraced to the indorsee, and it is his duty to make inquiries concerning it; if he takes it, though he gives a full consideration for it, he takes it on the credit of the indorser, and subject to all the equities with which it may be encumbered" (g). "The reason why a party who takes an overdue bill or note takes it with all its equities, is because on the face of it, it carries suspicion; that does not apply to the case of a bill or note payable on demand" (h). A promissory note payable on demand, is intended to be a continuing security (i). The indorsee of an overdue bill or note is liable to such equities only as attach on the bill or note itself, and not to claims arising out of collateral matters

(a) *Hay v. Ayling*, 20 L. J., Q. B. 171; 16 Q. B. 423; *Johnson v. Lansley*, 12 C. B. 468.

(b) *Pellecatt v. Angell*, 2 Cr. M. & R. 311. For other instances of securities, expressly avoided by the legislature, see *Byles on Bills*, 122, 7th edit.

(c) *Charles v. Marsden*, 1 Taunt. 224; *Sturtevant v. Ford*, 4 M. & Gr. 101; 4 Scott, N. R. 668.

(d) *Brown v. Davies*, 3 T. R. 82.

(e) *Boehm v. Stirling*, 7 T. R. 431.

(f) *Taylor v. Mather*, 3 T. R. 483.

(g) *Tinson v. Francis*, 1 Camp. 19. In *Sturtevant v. Ford*, 4 M. & G. 101, *Cresswell, J.*, says, "perhaps the better expression would be that he takes the bill subject to all its equities."

(h) *Per Parke, B.*, in *Cripps v. Davis*, 12 M. & W. 165.

(i) *Per Parke, B.*, in *Brooks v. Mitchell*, 9 M. W. 18.

existing between the earlier parties to it (*k*). Therefore to an action by the indorsee of an overdue note against the payee, a debt due to the payee from a former indorsee cannot be set off (*l*). If the plaintiff has received the bill from a person who could have maintained an action on the bill, then the circumstance of the indorsement, after the bill became due, is not sufficient to let in the defence of an illegal consideration (*m*). Whoever takes a bill after its dishonour takes it with all the infirmities belonging to it (*n*). A bill paid at maturity cannot be reissued, and no action can afterwards be maintained upon it by a subsequent indorsee; but if it be paid and indorsed before it becomes due, it will be a valid indorsement, in the hands of a *bond fide* indorsee (*o*). If a bill of exchange, payable to the order of a third person who has indorsed it, be dishonoured when due and taken up by the drawer, it ceases to be negotiable (*p*). But it is otherwise if the bill be payable to the drawer's own order. "A bill of exchange is negotiable *ad infinitum*, until it has been paid or discharged on behalf of the acceptor. If the drawer has paid the bill, it seems that he may sue the acceptor upon the bill, and if instead of suing the acceptor he put it into circulation on his own indorsement only, it does not prejudice any of the other parties who have indorsed the bill, that the holder should be at liberty to sue the acceptor" (*q*). But the drawer of an accommodation bill is in the same situation as the acceptor of a bill for value; he is the person ultimately liable; and his payment discharges the bill altogether (*r*).

IV. Of *Presentment for Acceptance*:—

Acceptance, p. 282.

Qualified Acceptance, p. 283.

Liability of the Acceptor, p. 285.

Non-Acceptance and Notice of Dishonour, p. 286.

Notice to Drawer, p. 287.

Notice to Indorser, p. 289.

Protest, p. 291.

Lost Bill, p. 293.

Liability of the Drawer on Non-Acceptance, p. 293.

Presentment for Acceptance.—When a bill is drawn payable within a certain time after sight, it is necessary, in order to fix the time when the bill is to be paid, to present it to the drawer for acceptance.—In other cases, it is not essentially necessary for the

(*k*) *Burrough v. Moss*, 10 B. & C. 563; *Holmes v. Kidd*, 28 L. J., 112 Ex.

(*l*) *Whitehead v. Walker*, 10 M. & W. 696.

(*m*) *Chalmers v. Lanion*, 1 Camp. 283; *Fairclough v. Paria*, 9 Exch. 690.

(*n*) *Crossley v. Ham*, 13 East, 498.

(*o*) *Burbridge v. Manners*, 3 Camp. 194; *Morley v. Culverwell*, 7 M. & W.

174; *Attenborough v. Mackenzie*, 25 L. J., Exch. 244.

(*p*) *Beck v. Robley*, 1 H. Bl. 89, n.; *Barham v. Caddy*, 9 A. & E. 281.

(*q*) *Per Lord Ellenborough*, in *Callow v. Lawrence*, 3 M. & S. 95; *Hubbard v. Jackson*, 4 Bing. 390.

(*r*) *Lazarus v. Cowie*, 3 Q. B. 459; *Parr v. Sewell*, 16 C. B. 684.

holder to present the bill before it is due; but it is advisable to procure an acceptance, if possible; for by that means another debtor is added to the drawer, who becomes a new security, and consequently makes the bill more negotiable. There is not any fixed time when a bill drawn payable within a certain time after sight, shall be presented to the drawee. But due diligence must be used, and care taken that the bill be presented within a reasonable time. "The only rule which can be applied to all cases of bills of exchange is, that due diligence must be used. Due diligence is the only thing to be considered, whether the bill be foreign or inland, or whether the bill be payable at or so many days after sight, or in any other manner." *Per Buller, J. (s)*. It seems that whether due diligence has been used is a question of law, but dependent upon facts, *viz.* the situation of the parties, their places of abode, and the facility of communication between them (*t*). The holder went to the place at which the bill was addressed. Finding the house shut up, he inquired for the drawee in the neighbourhood; this was held to be a sufficient presentment (*u*). If he chose to remove from the house, pointed out by the bill as his place of residence, he was bound to leave sufficient funds on the premises.

Acceptance.—Formerly an acceptance, or promise to accept, an existing (*x*) bill, by collateral writing (*y*), or even by parol (*z*), (except for the purpose of charging the drawer of an inland bill with damages and costs, see 3 & 4 Ann. c. 9, s. 5,) was equally binding with an acceptance on the face of the bill; provided the expressions used clearly and unequivocally (*a*) meant an acceptance of the bill. By stat. 1 & 2 Geo. IV. c. 78, s. 2, no acceptance of any *inland* bill after the 1st of August, 1821, was sufficient to charge any person, unless such acceptance were in writing on such bill, or, if there were more than one part of such bill, on one of the said parts. An unsigned acceptance (*b*), written on the face of a bill of exchange, was not made invalid by this statute; but it was a question for the jury whether it was intended to operate as an acceptance in its present form, or to be subsequently completed by signature. This statute extends to every part of the United Kingdom, and applies to the case of a bill drawn in one part of Scotland or Ireland, upon another; but a bill drawn in Ireland upon a person in England, is not an inland bill within the foregoing section, and consequently might be accepted without writing on such bill (*c*). But now by stat. 19 & 20 Vict. c. 97, "no ac-

(s) 2 H. Bl. 569.

(t) See *Darbishire v. Parker*, 6 East, 3.

(u) *Hine v. Allety*, 4 B. & Ad. 624, recognized in *Buxton v. Jones*, 1 Man. & Gr. 83.

(x) *Johnson v. Collings*, 1 East, 98.

(y) *Powell v. Monnier*, 1 Atk. 611.

(z) *Lumley v. Palmer*, 2 Str. 1000.

(a) See *Rees v. Warwick*, 2 B. & A. 113; *Powell v. Jones*, 1 Esp. N. P. C. 17.

(b) *Dufaur v. Oxenden*, 1 M. & Rob. 90, *Patteson. J.*

(c) *Mahoney v. Ashlin*, 2 B. & Ad. 478.

ceptance of any bill of exchange, whether *inland or foreign*, made after the 31st of December, 1856, shall be sufficient to charge any person unless the same be in writing on such bill, or if there be more than one part of such bill in one of the said parts, and *signed by the acceptor* or some person duly authorized by him."

Qualified Acceptance.—A *qualified acceptance* is, when the drawee undertakes to pay the bill in any other manner than according to the tenor and effect thereof. This species of acceptance, if qualified with a condition, is called a *conditional* acceptance. The holder of a bill may consider a qualified acceptance as a nullity, and protest the bill for non-acceptance, after which he is precluded from insisting upon it as an acceptance (*d*); but if the holder acquiesces in it, then such an acceptance becomes absolute only on the performance of the condition, which must be averred in the declaration. If the acceptor of a bill cancels his acceptance, and the holder causes it to be noted for non-acceptance, he thereby precludes himself from contending, that an acceptance of a bill once made cannot be retracted in point of law (*e*). Whether an acceptance once made could be cancelled by the acceptor, while the bill remained in his hands, was considered as doubtful. Lord *Kenyon*, C. J., is said to have determined at *nisi prius*, that it could not (*f*). But it has since been solemnly determined that it can, so that acceptance, like indorsement, is not complete till delivery of the bill (*g*). If an agreement to accept is conditional, and a third person takes the bill, knowing of the conditions annexed to the agreement, he takes it subject to such conditions (*h*). Formerly it was a question whether an acceptance making the bill payable at a particular place was a qualified acceptance. By the 1 & 2 Geo. IV. c. 78, it was, however, enacted, that an acceptance payable at a banker's or other particular place, is a general acceptance, unless the acceptor express in his acceptance that the bill is payable there only and not otherwise or elsewhere. But the doubt was confined to the case where the question arose between the holder and the acceptor; in cases between the indorser and the drawer, upon a special acceptance by the drawee, no doubt appears to have existed but that a presentment at the place specially designated in the acceptance was necessary (*i*). But this "statute neither intended to alter, nor has it in any manner altered, the liability of drawers of bills of exchange, but that it is confined in its operation to the case of acceptors alone." *Per Tindal*, C. J. (*k*).

Whether an acceptance be conditional or absolute is a question of law (*l*). A bill of exchange dated 8th September, 1856, drawn

(*d*) *Sproat v. Matthews*, 1 T. R. 182.

(*e*) *Bentinck v. Dorrien*, 6 East, 199.

(*f*) See 6 East, 200, and 15 East, 20.

(*g*) *Cox v. Troy*, 5 B. & A. 474. And see *Ralli v. Dennistoun*, 6 Exch. 483; 20 L. J., Exch. 278.

(*h*) *Per Lord Mansfield*, C. J., in delivering the opinion of the court, in *Mason v. Hunt*, Doug. 299.

(*i*) *Gibbs v. Mather*, 8 Bing. 219.

(*k*) *Ibid.* 221.

(*l*) *Sproat v. Matthews*, 1 Tr. 182.

and payable four months after date, was accepted in these words—“Accepted, payable at Messrs. O. & Co., London.—No. 1756. Due December 11th, 1856;” and then followed the signature of the acceptor in a different handwriting. It was held, that this was not a qualified acceptance, and that the bill became due on the 11th January, 1857 (*m*).

The following cases will illustrate the nature of qualified acceptances:—

Defendant accepted a bill of exchange, to pay it *when goods consigned to him*, and for which the bill was drawn, *were sold*. Plaintiff counted upon the custom of merchants. After verdict for plaintiff it was moved in arrest of judgment, that this acceptance, depending on the contingency of the sale of goods, was not within the custom of merchants, or negotiable. But *the court* (after consideration) held it good; for though the plaintiff might have refused to take such an acceptance, yet he might submit to take it. And it would affect trade if factors were not allowed to use this caution, when bills are drawn before they have an opportunity to dispose of the goods (*n*). So where defendant accepted a bill of exchange *upon account of the ship Thetis, when in cash for the said vessel's cargo*, and the plaintiff averred, that at the day when the bill became payable, the defendant was in cash for the said ship's cargo; it was objected, in arrest of judgment, that the defendant was not liable by this conditional acceptance; but the court overruled the objection (*o*). So an answer, that the bill would not be accepted till a navy bill was paid, was held a conditional acceptance to pay when the navy bill should be discharged (*p*). So when the answer was, “it will not be accepted until the ship with the wheat arrives from Scotland:” this was held to import a promise to accept the bill on the arrival of the cargo; and that the cargo having arrived, the defendant was liable as acceptor (*q*).

Defendant accepted a bill of exchange to pay part of the sum of money mentioned in the bill; this was held to be valid, although it was contended, that such partial acceptance was not within the custom of merchants (*r*). If the payee of a bill annexes a condition to his indorsement before the bill has been accepted, the drawee, who afterwards accepts it, is bound by that condition; and if the condition is not performed, the property in the bill reverts to the payee, and he may recover the contents against the acceptor (*s*). Where the defendant accepted a bill of exchange in these terms, “accepted on condition of its being renewed until the 28th November, 1844,” it was held that the word “renewed”

(*m*) *Fanshawe v. Peet*, 26 L. J., Ex. 314.

(*n*) *Smith v. Abbott*, Str. 1152.

(*o*) *Julian v. Shobrooke*, 2 Wils. 9.

(*p*) *Pierson v. Dunlop*, Cowp. 571.

(*q*) *Miln v. Prest*, 4 Campb. 393.

(*r*) *Wegersloff v. Keene*, Str. 214.

(*s*) *Robertson v. Kensington*, 4 Taunt. 30.

might be read "extended," and that the plaintiff was at liberty to treat the acceptance, as he had done in the declaration, as an acceptance of the bill itself, making it payable at an extended time (*t*).

There is also a kind of acceptance, called acceptance *supra protest*, where a bill being refused acceptance by the drawer, is accepted by some third person for the honour of a party to it. "It is an undertaking to pay if the original drawee upon a presentment to him for payment should persist in dishonouring the bill, and such dishonour by him be notified by protest to the person who has accepted for honour" (*u*).

Liability of the Acceptor.—The acceptor, by reason of his acceptance, which is *prima facie* evidence of his having in his hands effects of the drawer to answer the amount of the bill, is considered as the principal debtor, and primarily liable to all the parties to the bill; and an express agreement only will discharge him. The acceptor undertakes to pay the sum specified in the bill, and interest according to the legal rate of interest where the bill becomes due; but his engagement does not extend any further; consequently the acceptor of a foreign bill is not liable for re-exchange (*x*). Any party to the bill may maintain an action against the acceptor, if the bill is not duly honoured. If the holder of a bill of exchange brings separate actions against an acceptor (*y*), drawer, and indorser, at the same time, the court will stay the proceedings in any stage of the action against the drawer, or any of the indorsers, upon payment of the amount of the bill and costs of that particular action; and will now (by R. G. Trin. T., 1 Vict.) stay proceedings in the action against the acceptor, on the same terms; though formerly he must have paid the costs in all the actions, because he was the original defaulter and the occasion of all those costs (*z*). The holder of a bill of exchange, having been informed that the acceptor had not received any consideration for it, and that he had accepted the bill merely to accommodate the drawer, received interest upon the bill from the drawer for several years after it became due, and neglected to call upon the acceptor for payment. At length he brought an action against the acceptor; and it was held that it would well lie; and *Buller, J.*, said, that nothing but an express agreement would discharge an acceptor; and the plaintiff's conduct in this case only meant, that he would try to recover the amount of the bill from the drawer, who was the true debtor, if he could (*a*). But the holder of the bill may discharge the acceptor by parol (*b*).

(*t*) *Russell v. Phillips*, 14 Q. B. 891; 19 L. J., Q. B. 297.

(*u*) *Per Ellenborough, C. J.*, in *Hoare v. Cazenove*, 16 East, 391; and see *Mitchell v. Baring*, 10 B. & C. 11.

(*x*) *Woolsey v. Crawford*, 2 Camp. 445.

(*y*) *Smith v. Woodcock, Same v. Dudley*, 4 T. R. 691.

(*z*) See *Cornes v. Taylor*, 10 Exch. 441.

(*a*) *Dingwall v. Dunster*, Doug. 247. See *Steele v. Harmer*, 4 Exch. 1 (*in error*).

(*b*) *Whitley v. Tricker*, 1 Camp. 35.

The drawee (who was also the payee) of a foreign bill of exchange drawn in three parts, accepted and indorsed one part to a creditor, to remain in his hands until some other security was given for it; and afterwards accepted and indorsed another part, for value, to a third person. The acceptor substituted another security for the part first accepted, whereupon it was given up to him: it was held, that the holder of the part secondly accepted was entitled to recover on the bill against the acceptor (c).

An acceptance in blank charges the acceptor for the amount which the stamp will cover, and for the time limited by the stamp laws, and is an "authority" to anybody to draw upon the acceptor (d) when it may be convenient to do so, or when the person to whom the paper is given may think it advisable to apply it to this purpose (e).

Non-Acceptance and Notice of Dishonour (f).—If a bill is presented, and an acceptance refused, or qualified acceptance only offered, or any other default made, due diligence must be used in giving notice thereof to the drawer, if the holder means to resort to him for payment; and this rule ought to be observed, although the bill presented for acceptance be a bill payable at a certain time after date; for although it be not necessary to present a bill of this description for acceptance at all, yet if it be presented and dishonoured, notice becomes requisite in the same manner as upon non-payment: and it is not sufficient to give notice of the non-acceptance at the same time with the notice of non-payment (g). But the omission of the notice of non-acceptance will not vitiate the remedy against the drawer at the suit of a subsequent *bond fide* indorsee for a valuable consideration without notice, who was not in possession of the bill at the time of the dishonour (h). The notice of the dishonour may be either written or oral. If written, the question of its sufficiency is to be determined by the court; if oral, by the jury (i). A notice which gives such a description of the bill as would not mislead, is sufficient (k). It may be sent by post (l). It must be given within a reasonable time (m). What is reasonable time appears to be a question of law dependent on facts, *viz.* the situation of the parties, the place of their abode, and the facility of communication between them. Where the parties

(c) *Holdsworth v. Hunter*, 10 B. & C. 449.

(d) *Mountague v. Perkins*, 22 L. J., C. P. 188.

(e) *Armfield v. Allport*, 27 L. J., Exch. 42.

(f) A bill is dishonoured either by non-acceptance or by non-payment. The law relating to notices of these two facts is nearly the same, and some of the cases cited are cases of notice of nonpayment; see further under that heading, p. 302.

(g) *Roscow v. Hardy*, 2 Camp. 458. See *Dunn v. O'Keefe*, 5 M. & S. 282; and *Bartlett v. Benson*, 14 M. & W. 733.

(h) *Dunn v. O'Keefe*, *ubi sup.*

(i) See *Metcalfe v. Richardson*, 11 C. B. 1011; *Phillips v. Gould*, 8 C. & P. 355.

(k) *Bromage v. Vaughan*, 9 Q. B. 608.

(l) *Woodcock v. Houldsworth*, 16 M. & W. 126.

(m) *Darbishire v. Parker*, 6 East, 3.

reside in London, or in the same town, notice must be given in time to be received in the course of the day following the day of dishonour (*n*). Where the parties reside in different places, it is sufficient to send off notice on the day next after the day of dishonour (*o*). In a case of a foreign bill drawn payable in the East Indies, a certain time after sight, the court determined, that it was not necessary to send notice of the dishonour by any accidental foreign ship, which sailed thence, not direct for England; but that it was sufficient to have sent notice by the first regular English ship which sailed for England, considering the latter in the nature of a regular post between the two countries (*p*). But where a bill was drawn in duplicate on the 12th of August at Carbonear, in Newfoundland, payable ninety days after sight, on S. & Co. in England, for the freight of a voyage from Liverpool to Carbonear; and the bill was not presented for acceptance until the 16th of November; and it was proved that Carbonear was twenty miles from St. John's, with a daily communication between those places, and from St. John's there was a post-office packet three times a week to England, the average voyage being about twelve days; it was held, that the jury had properly found that the bill was not presented for acceptance within a reasonable time, no circumstances being proved in explanation of the delay (*q*).

The holder of a bill of exchange, on non-acceptance, and protest, and notice thereon, has an immediate right of action against the drawer; and the Statute of Limitations, therefore, runs against him from that time, and not from the non-payment of the bill when due (*r*).

Notice to Drawer.—The rule which requires notice to be given within a reasonable time *by the holder* of a bill of exchange to the drawer, of the drawee's refusal to accept, is calculated for the benefit of the drawer, in order that he may, upon receiving such notice, withdraw his effects out of the hands of the drawee. On this rule, however, an exception has been engrafted, *viz.*, that it is not necessary to give such notice to the drawer, where the drawer has not any effects in the hands of the drawee, *at the time when the bill is drawn*; because in this case the drawer cannot sustain any injury from the want of such notice (*s*); but if the drawer has effects in the hands of the drawee, *at the time the bill was drawn*, though it does not appear to what amount, and though such effects are withdrawn before the bill can be presented, the circumstance of there not being effects in the hands of the drawee, *at the time when the bill is presented* for acceptance, and refused, will not

(*n*) *Smith v. Mullett*, 2 Camp. 208;
Williams v. Smith, 2 B. & Ald. 500.

(*o*) *Williams v. Smith*, *supra*.

(*p*) *Muilman v. D'Eguino*, 2 H. Bl.
 565.

(*q*) *Straker v. Graham*, 4 M. & W. 721.

(*r*) *Whitehead v. Walker*, 9 M. & W.
 506.

(*s*) *Bickerdike v. Bollman*, 1 T. R. 406;
Rogers v. Stevens, 2 T. R. 713.

supersede the necessity of notice ; for it would be very dangerous and inconvenient, merely on account of the shifting of a balance, to hold notice not to be necessary ; it would be introducing a number of collateral issues in every case upon a bill of exchange, to examine how the account stood between the drawer and drawee, from the time the bill was drawn down to the time it was dishonoured ; *per* Lord *Ellenborough* (t). So if the drawer has effects in the hands of the drawee, at any time between the drawing of the bill and its becoming due, he is entitled to notice of nonpayment, although he had not any such effects at the time of bill drawn (u). So also if he had drawn the bill for the accommodation of the acceptor (x).

Where the question was, whether want of effects in the hands of the drawee excused the holder of a bill from the necessity as against the drawer of presenting the bill for *payment* at its maturity, as well as of giving notice of dishonour to the drawer, the court held that it did so excuse him ; for the same reason applied equally to both cases (y).

Lord *Kenyon*, C. J., held that it did not make any difference who gave notice *to the drawer* of the dishonour of the bill ; and in one case ruled that a notice from the acceptor was sufficient, observing, that the only end of the notice was, that the drawer might have recourse to the acceptor (z). And *Lawrence*, J., ruled, that the drawer, who had received due notice of dishonour from the first indorsee, was liable to the second indorsee, who had merely given notice to his indorser (a). And in an action by indorsee against drawer, Lord *Ellenborough* held it sufficient to prove that defendant had notice of dishonour from the acceptor (b). This point is now quite settled by *Chapman v. Keane* (c), in which it was held, that it is sufficient if the notice be given by any person, who is a *party* to the bill, and that it need not proceed either immediately or derivatively from the holder.

“ It is not necessary to say, whether the rule, which dispenses with notice in cases where the drawer has no effects in the hands of the drawee, was wisely adopted or not. That rule certainly proceeds upon the ground of fraud (d) in the drawer ; and the

(t) *Orr v. Maginnis*, 7 East, 359 ; *Blackan v. Doren*, 2 Campb. 503.

(u) *Hammond v. Dufrene*, 3 Campb. 145.

(x) *Ex parte Heath*, 2 Ves. & Beam. 240 ; *Sleigh v. Sleigh*, 19 L. J., Exch. 345.

(y) *Terry v. Parker*, 6 A. & E. 507 ; 1 Nev. & P. 752.

(z) *Shaw v. Croft*, sittings after T. T. 1798.

(a) *Jameson v. Swinton*, 2 Campb. 373.

(b) *Rosher v. Kieran*, 4 Campb. 87. But

see *Ex parte Barclay*, 7 Ves. jun. 598, *contra per Eldon*, Ch., and *Stewart v. Kennett*, 2 Campb. 177 ; *per* Lord *Ellenborough*, C. J., where notice was by a mere stranger. It may be observed, that in the case of *Ex parte Barclay*, the attention of the court was not directed to Lord *Kenyon's* opinion in *Shaw v. Croft*.

(c) 4 Nev. & M. 607 ; 3 A. & E. 193. See also *Harrison v. Ruscoe*, 15 M. & W. 231 ; and *Lysat v. Bryant*, 19 L. J., C. P. 160 ; 6 C. B. 46.

(d) There seems to be no necessity to

courts have said, that where the drawer has been guilty of fraud, he shall not claim the protection of those rules which were introduced for the benefit of drawers acting *bonâ fide*. When a person draws a bill upon another, who has no effects in his hands, he is not entitled to notice of its being dishonoured, since he must know, without such notice, that funds have not been provided to answer it;" *per Chambre, J. (e)*. In another case (*f*), *Eyre, C. J.*, said, it might be a proper caution to bill-holders not to rely on it as a general rule, that if the drawer had not any effects in the hands of the acceptor, notice was not necessary. The cases of acceptances on the faith of consignments from the drawer, not come to hand, and the case of acceptances, on the ground of fair mercantile agreements, might be stated as exceptions, and there might possibly be many others. Where A., the agent in America of B. in England, drew a bill upon B. and indorsed it to C., also residing in America, who indorsed it over. Before the bill became due, A. having reason to believe that B. would fail, lodged property belonging to B. in the hands of C. to answer the bill in case it should be returned, C. undertaking to restore the same whenever it should appear that he was exonerated from the bill. Acceptance and payment of the bill were refused, but no notice was given to A.; held, that A. was discharged (*g*). Lord *Ellenborough* held, that the drawer having effects in hands of acceptor before bill became due, was entitled to notice, although he had not such effects at time of bill drawn (*h*). The insolvency of the acceptor (*i*), although within the knowledge of the drawer, will not supersede the necessity of notice to the drawer, of the dishonour of the bill. Although the holder may have lost his remedy against the drawer, by laches, in not giving notice, yet a subsequent promise to the holder, by the drawer, that he will see the bill paid, will enable the holder to maintain an action on the bill (*k*).

Notice to Indorser.—If the holder of a bill of exchange looks to the indorser for payment, it is incumbent on him to give notice of the dishonour of the bill within a reasonable time; otherwise the indorser will not be liable (*l*). Thus it was held, that the indorsee of an inland bill of exchange, who had neglected to give notice to his indorser of the drawee's refusal to accept until a month had elapsed, in the course of which the drawer became a bankrupt, could not recover against such indorser. Lord *Mansfield, C. J.*,

put it upon the ground of fraud. At any rate, in the present day accommodation bills are not considered fraudulent.

(*e*) *Clegg v. Cotton*, 3 Bos. & Pul. 239.

(*f*) *Walwyn v. St. Quintin*, 1 B. & P. 652, overruled by *Cory v. Scott*, 3 B. & Ald. 623, but this *dictum* is good law.

(*g*) *Clegg v. Cotton*, 3 B. & P. 239.

(*h*) *Thackray v. Blackett*, 3 Camp. 165;

and see *Brown v. Maffey*, 15 East, 221; *Rucker v. Hiller*, 3 Camp. 217; 16 East, 43; and *Claridge v. Dalton*, 4 M. & S. 226.

(*i*) *Esdaile v. Sowerby*, 11 East, 114.

(*k*) *Hopes v. Alder*, 6 East, 16, n.

(*l*) *Bleasard v. Hirst and another*, 5 Burr. 2670.

said, in this case, that there was not any difference in this respect between an inland and a foreign bill.

The holder of a bill tendered it for acceptance, which was refused. He kept it till due without giving notice of non-acceptance, and then tendered it for payment, which was also refused. He then returned it to his, the second, indorser, who, not knowing of the holder's laches, took it up, and then sued the first indorser. It was held that the plaintiff's ignorance of the former holder's laches did not deprive the defendant of his right to set up such a defence (*m*). With respect to the drawer, it has been observed, that if he had no effects in the hands of the drawee at any time during the currency of the bill he will have no remedy over against a third party if he pay the bill, and will not in fact be prejudiced by want of notice when there is no necessity to give him notice (*n*); but with respect to the indorser, as he has not any concern with the accounts between the drawer and drawee, notice of dishonour must be given to him by the *holder* of the bill, although the drawer has not any effects in the hands of the drawee (*o*). The exception to the general rule dispensing with notice where there are no effects in the hands of the drawee, is confined to actions brought against the drawer: the indorser is in all cases entitled to notice. *Per* Lord *Kenyon*, C. J. (*p*). A subsequent promise by the indorser is a waiver of the objection for want of notice (*q*), and it is immaterial whether such promise be made to the plaintiff, or to a third person (*r*), who held the bill at the time; but a subsequent proposal by the indorser to pay the bill by instalments, *made without knowledge of all circumstances* relative to the bill having been dishonoured, has been held not to be a waiver of the objection for want of notice (*s*).

In an action against the payee of a note, it appeared that the note was not presented for payment till the day after it became due, and that no notice was given till five days after such presentment; but it also appearing that the defendant gave no value for the note, that he lent his name merely to give it credit, and that he knew at the time that the maker was insolvent, it was held, that the plaintiff was entitled to recover (*t*). So (*u*) Lord *Ellen-*

(*m*) *Roscow v. Hardy*, 12 East, 434. But see *Dunn v. O'Keefe*, *ante*, p. 286.

(*n*) *Bickerdike v. Bollman*, 1 Tr. 406; *Cory v. Scott*, 3 B. & Ald. 623; *Lafitte v. Slatler*, 6 Bing. 623.

(*o*) *Goodall v. Dolley*, 1 T. R. 712; *Wilkes v. Jacks*, Peake's N. P. C. 202, *S. P.*, *per Kenyon*, C. J.; *Saul v. Jones*, 28 L. J., 37 Q. B.; 1 E. & E. 59.

(*p*) *Wilkes v. Jacks*, Peake's N. P. C. 202.

(*q*) Peake's N. P. C. 202; *Lundie v. Robertson*, 7 East, 231, *S. P.*, recognized

in *Jones v. Morgan*, 2 Camp. 475, and in *Croxon v. Worthern*, 5 M. & W. 5, since the new rules which do not affect the question. In this case the issue was on the fact of presentment. See also *Hopley v. Dufresne*, 15 East, 275, as to what shall be evidence of a waiver of the objection.

(*r*) *Potter v. Rayworth*, 16 East, 417.

(*s*) *Goodall v. Dolley*, 1 T. R. 712.

(*t*) *De Berdt v. Atkinson*, 2 H. Bl. 336.

(*u*) *Sisson v. Thomlinson*, London Sit-
tings, 17th December, 1805, MSS.

borough, C. J., ruled, on the authority of the preceding case, that where the indorser has not given any consideration for a bill, and knows at the time that the drawer has not any effects in the hands of the drawee, he (the indorser) is not entitled to notice of the non-payment as a *bond fide* holder for a valuable consideration would be. But in a later case (*x*), in which it was held that an indorser is entitled to notice of dishonour although he has not received any value for his indorsement, at any rate if he does not know that the bill is an accommodation bill in its inception, the same learned judge seemed to throw some doubt upon the preceding case, and more recently, Lord *Denman*, C. J., delivering the judgment of the court, observed that the case of *De Berdt v. Atkinson* could hardly be supported, inasmuch as the defendant was not the party for whose accommodation the note was made; on the contrary, he lent his name to accommodate the maker (*y*).

In addition to notice, it was formerly held, that an indorsee could not sue his indorser until he had demanded payment of the *drawer*, on the ground that the indorser was only a warrantor for the payment of the drawer; but this doctrine has been overruled, and it is now settled, as well in the case of a foreign as in that of an inland bill, that such a demand is not necessary (*z*).

Protest.—Foreign bills of exchange ought to be presented for acceptance to the drawee, by a notary public, or his clerk; provided that in the case of a presentment by the clerk, and non-acceptance, the notary duly makes the protest (*a*). If the drawee refuses to accept the bill, then the notary ought to draw a protest for non-acceptance (*b*). Lord *Kenyon*, C. J., ruled, that when notice of non-acceptance was given to the indorser of a foreign bill, it was not necessary that such notice should be accompanied with a copy of the protest for non-acceptance (*c*). But where A. drew a bill of exchange, in the West Indies, on T., in London, at sixty days' sight, payable to W., or order: W. indorsed to G., who presented the bill to T., who refusing, G. noted it for non-acceptance, and at the end of sixty days protested it for non-payment, and then wrote a letter to A., and also to his agent in the West Indies, acquainting them that the bill was not accepted, in an action brought against A. by G., on this case, he was nonsuited; for *by not sending the protest* for non-acceptance he made himself liable (*d*). The only way in which this case can be reconciled with Lord *Kenyon's*

(*x*) *Brown v. Maffey*, 15 East, 221. See *Smith v. Becket*, 13 East, 187.

(*y*) See also on this point, *Sands v. Clarke*, 8 C. B. 751; 19 L. J., C. P. 87.

(*z*) *Bromley v. Frazier*, Str. 441; *Heylin v. Adamson*, 2 Burr. 669.

(*a*) See Brooke's Treatise on the Office of a Notary in England, wherein he shows that the dictum of *Buller*, J., in *Lefley v. Mills*, 4 T. R. 175, "that the demand

in the case of a foreign bill *must* be made by a notary public," is not well founded.

(*b*) *Per Holt*, C. J., 6 Mod. 29, *Buller v. Crips*.

(*c*) *Cromwell and another v. Hynson*, 2 Esp. N. P. C. 511.

(*d*) *Goostry v. Mead*, Gilb. Ev. p. 79, Edit. 1761, and Bull. N. P. 271.

that in such case he is not entitled to recover interest and charges (*k*). The *principal* is recoverable without *interest* (*l*). But it has been held (*m*), that to entitle the indorsee of an inland bill of exchange to recover *interest* from the drawer, it is not necessary to protest the same for non-payment. The statute here seems to give the drawer a remedy by action, against the party failing to make protest, for costs and damages (*n*).

Foreign bills are very frequently protested both for non-acceptance and non-payment; but a protest is hardly ever made for non-acceptance of an inland bill, though it is sometimes protested for non-payment. It is conceived that a protest of an inland bill is unknown to the common law, and must therefore derive its efficacy from the above enactments; from which it will follow, that it is applicable only to such instruments as are therein described, and that the steps therein required must be taken (*o*).

Lost Bill.—Formerly the loser of a negotiable bill could not recover at law against antecedent parties, although a sufficient indemnity was tendered (*p*); he must have resorted to a court of equity for relief (*q*). Now, however, it is enacted by the 17 & 18 Vict. c. 125, s. 87, that “in case of any action founded upon a bill of exchange or other negotiable instrument, it shall be lawful for the court or a judge to order that the loss of such instrument shall not be set up, provided an indemnity is given to the satisfaction of the court or judge or a master against the claims of any other person upon such negotiable instrument.”

Liability of the Drawer on Non-acceptance.—If the drawee, on presentment for acceptance, dishonour the bill, the drawer may be called on for immediate payment. A foreign bill of exchange was drawn payable at 120 days after sight, but when the bill was presented for acceptance, that was refused; upon which an action was immediately brought against the drawer, without waiting till the expiration of the 120 days. On the trial, the defendant objected, that he was not liable until the expiration of the 120 days, and offered to call evidence to prove that the custom of merchants was such. But Lord *Mansfield*, C. J., said, the law was clearly otherwise, and refused to hear the evidence (*r*). And in a later case (*s*), it was adjudged, that the indorsee of a foreign bill of exchange might bring an action against the person who had indorsed it to

(*k*) *Per Holt*, C. J., in *Brough v. Par-kins*, Lord Raym. 993.

(*l*) *Per Lord Hardwicke*, C. J., in *Lumley v. Palmer*, Ca. Temp. Hardw. 77.

(*m*) *Windle v. Andrews*, 2 B. & A. 696.

(*n*) *Per Holt*, C. J., in *Brough v. Par-kins*, Lord Raym. 993. Lord *Hardwicke*, C. J., in *Lumley v. Palmer*, justly observed, that this statute was drawn very

darkly.

(*o*) *Byles on Bills*, 224, 7th Edit.

(*p*) *Hansard v. Robinson*, 7 B. & C. 90; *Rannuz v. Crowe*, 1 Exch. 172; *Crowe v. Clay*, 9 Exch. 604; 23 L. J., Exch. 150.

(*q*) See *Walmesley v. Child*, 1 Ves. 341.

(*r*) *Bright v. Purrier*, Bull. N. P. 269.

(*s*) *Ballingalls and another v. Gloster*, 3 East, 481.

him, immediately on the non-acceptance of the drawee, although the time for which the bill was drawn was not elapsed, on the ground that every indorser was in the nature of a new drawer. And Lord *Ellenborough*, C. J., said, that, in a late case tried before him at Guildhall, it appeared to be the universally received law on the Continent, that an indorser was liable immediately on the non-acceptance of the drawee.

V. *Of the Transfer of Bills of Exchange.*

Of the Party in whom the Right of Transfer is vested, p. 299.

Bills payable to order or to bearer are negotiable, and the transfer of them for a good and valuable consideration vests a right of action in the assignee. And if a non-negotiable bill be indorsed by the payee, he is liable upon it to the indorsee (*t*). It is a rule of the common law, that choses in action are not assignable; but in the case of bills of exchange there is an exception to this rule, and in favour of commercial intercourse they are, by the custom of merchants, assignable to a third person not named in the bill, or party to the contract, so as to vest in the assignee a right of action *in his own name*. Whether a bill of exchange be negotiable or not, is a question of law (*u*). In respect of bills payable to order, the custom has directed that the assignment should be made by a writing on the bill, called an indorsement, and be completed by delivery; and in respect of bills payable to bearer, that the assignment should be constituted by delivery only. If a bill be payable to A., or bearer, and A. delivers it over for money received without indorsement, this is a sale of the bill, and the seller does not become a new security, for if he had indorsed it, he had become a new security, and then he had been liable upon the new indorsement (*x*). A transfer of a bill of exchange by indorsement is an act similar in effect to making a new bill, the indorser being in the nature of a new drawer (*y*). By indorsement, the indorser admits the signature and capacity of all the prior parties to the bill (*z*). By the law merchant, every person having possession of a bill, has (notwithstanding any fraud on his part, either in acquiring or transferring it) full authority to transfer such bill, but with this limitation, that, to make such transfer valid, there must be a delivery, either by him or by some subsequent holder of the bill, to some one who receives such

(*t*) *Hill v. Lewis*, Salk. 133; but see *Bannister v. Hogarth*, 11 M. & W. 97.

(*u*) *Grant v. Vaughan*, 3 Burr. 1523, 1526, 1528.

(*x*) *Per Holt*, C. J., *Governor and Company of the Bank of England v. Newman*, Lord Raym. 442. And see *Camidge v. Allenby*, 6 B. & C. 373; *Robson v. Oliver*, 10 Q. B. 704; *Poirier v. Morris*, 2

E. & B. 103.

(*y*) *Per Holt*, C. J., Skin. 411; *Hardwicke*, Ch., 1 Atk. 202; Lord Mansfield, C. J., 2 Burr. 674; Lord *Ellenborough*, C. J. 3 East, 482.

(*z*) *Lambert v. Oakes*, 1 Lord Raym. 443; *Macgregor v. Rhodes*, 25 L. J., Q. B. 318.

bill *bonâ fide* and for value, and who is either himself the holder of it, or a person through whom the holder claims (*a*). An indorsement may be of such a character as to give a title to the bill, although insufficient in law to give a right of action against the indorser (*b*).

Indorsements are of two kinds: 1st, blank; 2nd, full or special. An indorsement in blank, which is the most common, is made by writing the indorser's name on the back of the bill, without any mention of the name of the person in whose favour the indorsement is made. Indorsements, whether blank or special, subsequent to a blank indorsement by the payee, may be struck out even at the trial (*c*); consequently a remote indorsee may declare as the immediate indorsee of the payee or first indorser. Indorsees of a bill of exchange against acceptor:—the bill was indorsed in blank by the payee, and after several indorsements it came to one Jackson, a bankrupt, (whose assignees had indemnified defendant,) under a special indorsement to him or order. Jackson, without indorsing the bill, sent it to Muir and Atkinson, who discounted it with plaintiffs. Plaintiffs had struck out all the indorsements except the first. *Per Lord Kenyon*, C. J.: The fair holder of a bill may consider himself as the indorsee of the payee, and strike out all the other indorsements. This special indorsement being made after the payee had indorsed it, cannot affect the title of the present plaintiffs (*d*). If A., the payee of a bill of exchange, indorses it in blank, and delivers it to B., and B. writes above A.'s indorsement, "*Pay the contents to C.*" without subscribing his own name, B. is not liable to C. as an indorser of the bill: for, in order to make a party liable as an indorser, his name must appear written with intent to indorse (*e*). By the law of France, an indorsement in blank does not transfer any property in a bill; the holder of a bill, therefore, drawn in that country, and indorsed there in blank, cannot recover against the acceptor in the courts of this country (*f*). An indorsement in full, or special indorsement, mentions the name of the indorsee, as thus, "*Pay the contents to A. B.*" and is subscribed with the name of the indorser. A full or special indorsement contains in itself a transfer of the interest in the bill to the person named in such indorsement (*g*). But a bare indorsement without other words purporting an assignment, does not work an alteration of the property (*h*). Clark having a bill of exchange payable to

(*a*) *Per Alderson*, B., delivering judgment of the court in *Marston v. Allen*, 8 M. & W. 494. See also *Lloyd v. Howard*, 20 L. J., Q. B. 1; 15 Q. B. 995; and *Barker v. Richards*, 6 Exch. 63.

(*b*) *Smith v. Johnson*, 27 L. J., Exch. 363.

(*c*) *Theed v. Lovell*, Str. 1103.

(*d*) *Smith v. Clarke*, Peake's N. P. C. 225; *Chaters v. Bell*, 4 Esp. N. P. C. 210. *Per Lord Ellenborough*, C. J.; and

see *Bartlett v. Benson*, 14 M. & W. 733, and *Fairclough v. Pavia*, 9 Exch. R. 690.

(*e*) *Vincent v. Horlock*, 1 Campb. 442.

(*f*) *Trimbui v. Vignier*, 1 B. N. C. 151; 4 Mo. & Sc. 695.

(*g*) Poth. *Traité du Contrat du Change*, Part I. chap. 2, ss. 23, 24.

(*h*) *Per Cur.*, *Lucas v. Haynes*, Salk. 130.

him or order, put his name upon it, leaving a vacant space above, and sent it to J. S., his friend, who got it accepted; but the money not being paid, Clark brought assumpsit against the acceptor. And it was objected, that the action should have been brought by J. S. But *per Holt, C. J.*: J. S. had it in his power to act either as a servant or assignee. If he had filled up the blank space, making the bill payable to him, as he might have done if he would, that would have witnessed his election to have received it as indorsee. The property of the bill would have been transferred to him, and he only could have maintained this action against the acceptor; but since he has not filled up the blank space, his intention is presumed to act as servant only to Clark, whose name was put there; that on payment thereof, a receipt for the money might be written over his name, and therefore the action is maintainable by Clark (*i*). The payee of a bill of exchange indorsed it specially to the plaintiffs, and immediately after the special indorsement, the defendant indorsed the bill and then the plaintiffs indorsed it; it was held, that the defendant's indorsement was equivalent to a new drawing by him, and that he was liable to be sued upon the bill by the plaintiffs (*k*).

Promissory notes and bills of exchange are frequently indorsed in this manner, "Pay the money to my use," in order to prevent their being filled up with such an indorsement as passes the interest (*l*). "A bill, though once negotiable, is certainly capable of being restrained. I remember this being determined on argument. A blank indorsement makes the bill payable to bearer; but by a special indorsement the holder may stop the negotiability" (*m*). These positions were recognised in a case in the Exchequer Chamber (*n*), where a bill payable to the order of A. was indorsed by A. to B., and then indorsed by B. thus: "Pay to C. or his order *for my use*;" it was held, that this indorsement was restrictive, and that the property in the bill remained in B.

It is not necessary that in a special indorsement the words "or order" should be subjoined to the name of the indorsee; for if a bill be drawn payable to order, the negotiability of the bill will not be restrained by the omission of the words "or order" in the indorsement, as will appear from the following cases:—

Upon a case made at nisi prius, coram *Pratt, C.J.*, it appeared that the plaintiff had declared on an indorsement made by A., whereby he appointed the payment to be to B. *or order*, and upon producing the bill in evidence, it appeared to be payable to A. or order, but the indorsement was in these words, "Pay the contents

(*i*) *Clark v. Pigot*, Salk. 126, and 12 Mod. 192.

(*k*) *Penny v. Innes*, 1 Cr. M. & R. 439. See *Allen v. Walker*, 2 M. & W. 317.

(*l*) *Per Lord Hardwicke, Ch.*, in *Snee*

v. Prescott, 1 Atk. 249.

(*m*) *Per Lord Mansfield, C. J.*, *Ancher v. Bank of England*, Doug. 639.

(*n*) *Sigourney v. Lloyd*, 8 B. & C. 622 5 Bing. 525.

to B.;" and therefore it was objected, that the indorsement, not being to order, did not agree with the plaintiff's declaration; but upon consideration, the whole court were of opinion, it was well enough, that being the legal import of the indorsement; and that the plaintiff might upon this have indorsed it over to another, who would be the proper order of the first indorser (*o*). Before this decision, the same doctrine had been laid down with respect to a promissory note (*p*), *viz.*, that where a note is drawn payable to order, and the payee indorses it to A. (omitting the words "or order"), A. has (notwithstanding such omission) all the interest in the note, and may indorse it to B., who, upon such indorsement, may maintain an action against the maker. So where a foreign bill of exchange was drawn by A. on B. (*q*), payable to C. or order, and accepted by B., and C. indorsed it to D. without adding the words "or order," and D. afterwards indorsed it to E., who brought an action against B. the acceptor for nonpayment; evidence having been adduced at the trial of the usage of merchants with respect to indorsements of bills payable to order, where the words "or order" were omitted in the indorsement, which evidence was contradictory, some merchants declaring that the omission did not make any difference, others, that it restrained the negotiability of the bill, and made it payable to the indorsee only; the jury found a verdict for the defendant.—On a motion for a new trial, on the ground that evidence of the usage ought not to have been allowed; that the custom of merchants was part of the law of England, and that the law of England was fully settled upon this point: the court were unanimous that a new trial ought to be granted; and Lord *Mansfield*, C.J., said, he was clear that the evidence ought not to have been admitted, for the law was fully settled in the cases of *More v. Manning* and *Acheson v. Fountain*. The other judges concurred; and *Denison*, J., said, that there was not any instance of a restrictive limitation, where a bill was originally made payable to A. or order; that he had never heard of an indorsement to A. only, and that in general *the indorsement followed the nature of the thing indorsed*. As a bill of exchange payable to A.'s order, is, by the custom of merchants, payable to A. if he does not make any order; so, by an indorsement of a bill of exchange to the order of A., A. is entitled to payment if he makes no order. A bill of exchange was drawn, payable to I. S., who indorsed it in this manner: "Pay the contents of the bill unto the order of Mr. Fisher." Fisher brought an action as indorsee, averring he had made no order to receive the money. The defendant demurred to the declaration, supposing that Fisher could not maintain the action, because the indorsement was not to him,

(*o*) *Acheson v. Fountain*, Str. 557.

(*p*) *More v. Manning*, Comyns' R. 311.

(*q*) *Edie v. East India Company*, 2 Burr. 1216, and 1 Bl. R. 295, recognized

since the new rules, which do not make any alteration in the law merchant, in *Cunliffe v. Whitehead*, 3 B. N. C. 830.

but to his order; sed per Curiam: The action is well brought against the indorser; for among tradesmen this form of indorsement is commonly used, although it is intended to be made payable to the person whose order is mentioned (*r*).

In order to derive a legal title to a bill of exchange payable to order, it is necessary for the indorsee in an action against the acceptor, upon a traverse of the indorsement, to prove the handwriting of the payee or first indorser (*s*); and, therefore, though the bill may come into the hands of another person of the same name with the payee, yet his indorsement will not confer a title; and such an indorsement, if made with the knowledge that he is not the person to whom the bill was made payable, with intent to defraud, is a forgery, through the medium of which a title cannot be derived (*t*).

With respect to bills payable to bearer, or bills payable to order, but indorsed in blank, both which pass by delivery, it is now clear law that if an assignee take them, without any knowledge of defect of title, *bonâ fide*, and for a valuable consideration, such assignee is entitled to payment (*u*). "I believe," said Lord *Denman*, in *Arbouin v. Anderson*, "we are all of opinion that gross negligence only would not be a sufficient answer by the defendant where the plaintiff has given consideration for the bill. Gross negligence may be evidence of *mala fides*, but it is not the same thing. We have shaken off the last remnant of the contrary doctrine." This proposition, as far as it affects bills payable after sight, or after date, and not on demand, must be understood with this restriction, *viz.* that the party seeking to recover on such bill has not taken it after it became due: for in that case he takes the bill subject to all its equities. See *ante*, p. 280.

A banker is bound to pay a check drawn by a customer within a reasonable time after he (the banker) has received sufficient funds belonging to the customer (*x*), and the customer may maintain an action of tort against the banker for refusing payment of a check under such circumstances, and is entitled to have a verdict for nominal damages, although he cannot prove that he has sustained any actual damage. This decision rests entirely on the consideration that the action, an action on the case, was founded on a contract, not on a general duty implied by law. The contract creates a duty, and the neglect to perform that duty, or the nonfeasance, is a ground of action upon a tort (*y*). Where a customer of the Bank of England was in the habit of making his

(*r*) *Fisher v. Pomfret*, Carth. 403.

(*s*) *Smith v. Chester*, 1 T. R. 654.

(*t*) *Mead v. Young*, 4 T. R. 28; *per* three justices, *Kenyon*, C. J. diss. See *Stebbing v. Spicer*, 19 L. J., C. P. 28.

(*u*) *Arbouin v. Anderson*, 1 Q. B. 498; *Raphael v. Bank of England*, 25 L. J., C. P. 33; 17 C. B. 161; *Carlton v. Ire-*

land, 5 E. & B. 765.

(*x*) *Marzetti v. Williams*, 1 B. & Ad. 415.

(*y*) *Per Tindal*, C. J., delivering the judgment of the Exchequer Chamber in *Boorman v. Brown*, 3 Q. B. 526. See also *Rolin v. Steward*, 14 C. B. 595.

acceptances payable at the Bank, and one of such acceptances being presented for payment at eleven o'clock in the morning was dishonoured, for want of assets, and was presented again by a notary at six in the evening, when the same answer was given by a person stationed for that purpose; it was held, in an action for dishonouring the bill, that the Bank, although they had, before six o'clock, received assets, were not bound to pay the bill, it being after the usual hours of business (z).

Of the Party in whom the Right of Transfer is vested.—Where the defendant drew a bill of exchange upon A., payable at so many days' sight to B. or order, for the use of C., it was held that the right of transfer was in B., C. having an equitable title only (a).

It is the constant usage of merchants for administrators to indorse and assign over bills of exchange made payable to their intestate's order (b). But where an indorsement is necessary, and the testator has written his name, but not delivered the bill, the executor cannot complete the indorsement by delivery (c). Where a bill of exchange has been indorsed by the payee to A. and B. as executors, they may declare as such in an action against the acceptor (d). If a bill of Exchange is drawn, payable to A. and B. or their order, and A. and B. are not partners: to make it negotiable, the bill should be indorsed by A. and B., such being the usage of merchants (e); but in such case, if the bill be indorsed by A. in the name of himself and B., and afterwards the drawee accepts the bill so indorsed, it is not competent to him to object, that the bill has not been regularly indorsed (f).

As the property in a bill of exchange passes to the holder, when he pays the consideration, and as indorsement is merely evidence of the transfer, a trader, who before his bankruptcy has parted with a bill for a valuable consideration, but omitted to indorse it, may indorse it after his bankruptcy: and such indorsement will be a sufficient title to the party to whom it was delivered (g).

(z) *Whitaker v. Bank of England*, 1 Cr. M. & R. 744.

(a) *Evans v. Cramlington*, Carth. 5; affirmed in error, 2 Vent. 207; see also *Sigourney v. Lloyd*, 8 B. & C. 630.

(b) *Per Denison, J.*, 4 Wils. 4.

(c) *Bromage v. Lloyd*, 1 Exch. 32.

(d) *King v. Thom*, 1 T. R. 487.

(e) *Carvick v. Vickery*, Doug. 653, n.

(f) *Jones v. Radford*, 1 Campb. 83, n.

(g) *Smith v. Pickering*, Peake's N. P. C. 50.

VI. *Of Presentment for Payment, and herein of the—**Days of Grace*, p. 300.*Non-Payment and Notice thereof*, p. 302.*Protest*, p. 308.

Where bills of exchange are drawn payable at usance, or a certain time after date, or after sight, such bills ought not to be presented for payment at the expiration of the time mentioned in the bills, but at the expiration of what are termed days of grace. This term signifies the time which, by the usage of the countries between which the bills are drawn, is appointed for the payment of them (*h*). Where bills are payable so many days after sight, the days are computed from the day the bills are accepted, or protested for non-acceptance. In an action against the drawer of a bill of exchange, the evidence being that the bill had been demanded from the acceptor on the day preceding the last day of grace, the plaintiff was nonsuited (*i*). "In cases of foreign bills of exchange, the custom is that three days are allowed for payment of them (*k*), and if they are not paid on the last of the said days, the party ought immediately to protest the bill and return it, and by this means the drawer will be charged; but if he does not protest on the last of the three days of grace, there, although he upon whom the bill is drawn fails, the drawer will not be chargeable; for it shall be reckoned his folly that he did not protest, &c. But if it happens that the last of the said three days is a Sunday, or a great holiday, as Christmas-day, &c., upon which no money used to be paid, there the party ought to demand the money on the second day: otherwise it will be at his own peril, for the drawer will not be chargeable." *Per Holt*, J. (*l*). Good Friday is to be considered as a Sunday or Christmas-day (*m*). By stat. 7 & 8 Geo. IV. c. 15, s. 2, bills of exchange becoming due on a day appointed by proclamation for fast or thanksgiving are payable on the day preceding: and by sect. 3, Good Friday, Christmas-day, and every such day of fast or thanksgiving, is to be considered, as regards bills of exchange and promissory notes, as Sunday. .

The foregoing passage from Lord Raymond's Reports mentions only foreign bills of exchange; but it was said by Lord *Kenyon*, C. J. (*n*), that it had been settled for more than half a century, that inland bills of exchange were payable at the same time as foreign bills of exchange. A foreign bill of exchange was drawn on C.

(*h*) Poth. s. 15.(*i*) *Wiffen v. Roberts*, 1 Esp. N. P. C. 262.(*k*) *Per* merchants in evidence at Guildhall, Trin. 7 Will. III. coram *Holt*, C. J., *Tassell v. Lewis*, Lord Raym. 743. Three days, exclusively of the day on which thebill becomes due, every where, except at *Hamburgh*, where that day makes one of the days of grace.(*l*) *Tassell v. Lewis*, Lord Raym. 743.(*m*) Stat. 39 & 40 Geo. III. c. 42.(*n*) *Brown v. Harraden*, 4 T. R. 152.

and Co. at Liverpool, payable to A. in London. C. and Co. having refused to accept, it was accepted by B. in London, for the honour of the payee, if regularly protested and refused when due. It was held, in an action against B., that under the special form of the acceptance, a presentment for payment to C. and Co. at Liverpool, a refusal by them, and a protest there, were necessary, and therefore that the bill was properly presented for payment there on the day it became due (o). Days of grace are allowed also on promissory notes, and on bills or notes payable by instalments (p). There is a distinction between bills payable at a certain time after date, and bills payable at a certain time after sight. The holder of a bill payable after date is bound to use all due diligence, and to present such bill at its maturity, but in case of a bill payable after sight, the holder may put the bill into circulation before he presents it (q); or, although he does not circulate it, he may take a reasonable time to present it. A delay until the fourth day in presenting a bill on London, given within twenty miles thereof, is not unreasonable. I am not aware that it has ever been solemnly decided, that days of grace are allowable on bills of exchange payable *at sight*. The weight of authority is in favour of such an allowance. Days of grace are not allowed on bills payable on demand. There are not any days of grace in France (r).

No debt arises upon a bill payable after sight, until a presentment for payment; and consequently the Statute of Limitations will not operate as a bar to such bill, unless it has been presented for payment six years before the action commenced (s). With respect to promissory notes payable *on demand*, the statute runs from the date of the note (t); but where the note was payable "two years *after demand*;" it was held, that the statute did not begin to run until two years after demand of payment had been made (u). Upon a promissory note, payable on demand "*at sight*," an action cannot be maintained until after presentment (x). Where the defendant promised, in consideration of the plaintiff having agreed not to sue him on two bills, to pay him "whenever his circumstances would enable him to do so, and he should be called upon for that purpose:" it was held, that the limitation of action ran from the time of defendant being able to pay, though plaintiff had made no demand, and had not been informed by

(o) *Mitchell v. Baring*, 10 B. & C. 4.

(p) *Oridge v. Sherborne*, 11 M. & W. 374; *Carlton v. Kenealy*, 12 M. & W. 139.

(q) *Per Gibbs*, C. J., in *Goupy v. Hardin*, Holt, N. P. C. 344; *Fry v. Hill*, 7 Taunt. 397.

(r) *Rothschild v. Currie*, 1 Q. B. 43; 4 P. & D. 737; and they are abolished in New York, see Civil Code, § 1781.

(s) *Holmes v. Kerrison*, 2 Taunt. 323.

(t) *Christie v. Fensick*, C. B., London Sittings after M. T. 52 Geo. III. Sir J. Mansfield, C. J., MS. This case is said to have been overruled, *sed quere*. See Byles on Bills, 300, n. (x), 7th edit., and *Norton v. Ellam*, 2 M. & W. 461.

(u) *Thorpe and Wife v. Booth*, 1 Ry. & Moo. 388; *Clayton v. Gosling*, 5 D. & C. 360.

(x) *Dixon v. Nuttall*, 1 Cr. M. & R. 307; 4 Tyrw. 1013.

defendant, or otherwise had knowledge of such ability (y). Where to an action on a bill the Statute of Limitations is pleaded, it is now settled that fraud cannot be replied (z).

Non-payment and Notice thereof.—The acceptor of a bill of exchange (a) having or being presumed to have, in his hands effects of the drawer, for the purpose of discharging the bill, is considered as the principal debtor, and is primarily liable; payment must, therefore, be demanded of the acceptor, in the first instance, on the day when the bill becomes due; and in case of refusal or default, due notice of such demand and refusal or default must be given to the drawer, within a reasonable time after such demand and refusal or default, in order that he may withdraw his effects as speedily as possible from the hands of the acceptor. Until these previous steps have been taken, the drawer cannot be resorted to for non-payment of the bill.—The want of notice to a drawer who has effects in the hands of the acceptor, after dishonour of the bill, is considered as tantamount to payment by him. The notice of dishonour may be given on the same day on which payment is refused (b). It is generally no answer to the want of notice that the drawer has not been injured thereby (c); but want of effects in the hands of the drawee at the time of drawing the bill and of its maturity, and the absence of reasonable grounds for expecting that the bill will be paid, will dispense with the necessity of giving notice of dishonour and of presenting the bill for payment to the drawee, when it arrives at its maturity (d). “Every bill,” says Parke, B., delivering the judgment of the court in *Carter v. Flower* (e), “*prima facie* must be taken to have been drawn for value received, that is, on a person who was to accept and pay by reason of having value, and if the drawer draws on one who is not his debtor, nor has received any value for the bill, he must be considered at least *prima facie* to request him to accept and pay on account of the drawer, or, in other words, for his accommodation; and if he does not provide funds in time, he necessarily knows that the bill would not be paid at maturity. He is the person who himself ought to pay the bill, and consequently *prima facie* cannot be entitled to notice. But the case of an indorser of a bill of exchange stands upon a different footing from that of a drawer. He is in the nature of a surety or guarantor of its payment on due presentment, and is presumed to know nothing of the arrangement between the drawee and drawer. Story on Bills, 314. He is *prima facie* entitled to notice. It is not enough to exempt him that the bill is drawn without value,

(y) *Waters v. Earl of Thanet*, 2 Q. B. 757; 2 G. & D. 166.

(z) *Imperial Gas Company v. London Gas Company*, 10 Exch. R. 39.

(a) *Dagglish v. Weatherby*, 2 Bl. R. 747.

(b) *Burbridge v. Mannors*, 3 Campb. 193; *Hine v. Allely*, 4 B. & Ad. 624.

(c) *Dennis v. Morrice*, 3 Esp. 158.

(d) *Terry v. Parker*, 6 A. & E. 502.

(e) 16 M. & W. 749; 16 L. J., Exch. 202.

and that the drawer has no effects in the hands of the drawee. If he indorses to the holder without value or effects in the hands of prior parties, *non constat* that he is not entitled to notice, for he may have indorsed for the accommodation of others, in which case it is now clearly established that he has a right to notice, because, on payment, he may recover over against those persons."

Notice may be sent by Post.—In an action by an indorsee of a bill against the drawer (*f*), it appeared that the bill had been drawn on the 1st of March, 1806, by the defendant, on one Moses Agar, payable three months after date: and the plaintiff, having become the holder of it, had placed it in the hands of his bankers, Down and Co. On the 4th of June, when the bill became due, a clerk of Down and Co. presented it for payment; and it was dishonoured. On the 5th they returned it to the plaintiff, who, by letter put into the two-penny post on the 6th, gave notice to the defendant of the dishonour; the plaintiff living in London and the defendant at Shadwell. The case was left to the jury on the question whether the notice of the dishonour had been given in reasonable time; and the jury, being of opinion that it had, found a verdict for the plaintiff. And on motion for a new trial, on the ground that due diligence had not been used, the court refused the rule:—*Le Blanc, J.*, observing that it could not be contended that a banker ought to give notice of the dishonour to any but his customer, for whom he held the bill; and he thought that the holder of a bill might avail himself of the conveyance by the two-penny post (*g*). The distance at which the parties live from one another is immaterial, provided they are within the limits of the two-penny post; and it is sufficient if the letter be put into the receiving-house in time for the party to have it on the day when he ought to have notice of its dishonour (*h*). "If," says *Parke, B. (i)*, "a party puts a notice of dishonour into the post, so that in the due course of delivery it would arrive in time, he has done all that can be required of him, and it is no fault of his that delay occurs in the delivery." The notice should be sent to the place of business or residence of the person for whom it is intended. Notice to the drawers of non-payment, by sending to their counting-house, during hours of business, on two successive days, knocking there, and making noise sufficient to be heard by persons within, and waiting there several minutes, the inner door of the counting-house being locked, has been held to be sufficient, without leaving

^r (*f*) *Scott v. Lifford*, 9 East, 347; 1 Campb. 246. See also *Langdale v. Trimmer*, 15 East, 291.

(*g*) See *Robson v. Bennett*, 2 Taunt. 388.

(*h*) *Hilton v. Fairclough*, 2 Campb. 633. Delivery to the bellman, who is to be considered as an ambulatory post-

office, is sufficient *prima facie*. *Skilbeck v. Garbett*, 7 Q. B. 846. The post-mark on the letter is *prima facie*, although not conclusive evidence, of the time when the letter was posted. *Stocken v. Colvin*, 7 M. & W. 515.

(*i*) *Stocken v. Colvin*, 7 M. & W. 516.

a notice in writing, or sending by the post, though some of the drawers live at a small distance from the place (*k*). So a verbal notice left with the wife of the drawer at his house has been held sufficient (*l*).

By stat. 7 & 8 Geo. IV. c. 15, s. 1, where bills of exchange or promissory notes becoming due on the day preceding Good Friday or Christmas-day are dishonoured, notice thereof may be given on the day after; and when Christmas-day falls on Monday, and the bill or note becomes due on the Saturday preceding, notice may be given on Tuesday: and by sect 2, when bills or notes become due on or on the day previous to a day of fast or thanksgiving, notice may be given on the day after; and when such day of fast or thanksgiving is a Monday, and the bill or note becomes due on the Saturday preceding, notice may be given on Tuesday. The law merchant respects the religion of different people; and consequently a person is not required to give notice of the dishonour of a bill on a day when by the rules of his religion it is unlawful to attend to secular affairs; *e. g.* a great Jewish festival (*m*).

Where there are several indorsements, and the holder gives notice of dishonour to his indorser, neither that indorser, nor any prior indorser, is bound to transmit the notice of dishonour on the very day on which he receives it. Each successive indorser will be considered as having used due diligence, if he transmit the notice of dishonour on the day after it was received, in a case where all the parties live in the same place. Lord *Ellenborough* (*n*) said, that it was of great importance that there should be an established rule upon this subject, and he thought there could be none more convenient than that where the parties reside in London, each party should have a day to give notice. In that case the plaintiff had notice of dishonour on the Monday, and did not give notice to his indorser until the Wednesday; Lord *Ellenborough* ruled, that as a day had been lost, the notice was not given in due time. A subsequent indorser may avail himself of a notice given by a prior indorser to the drawer (*o*).

If the drawee of a bill goes abroad, leaving an agent here in England with power to accept bills, by virtue of which power the agent accepts the bill in question, it is incumbent on the holder to present such bill to the agent for payment, if the drawee continues absent (*p*). "Bills of Exchange," said *Abbott*, C. J. (*q*), "of late years have been made payable by the acceptor, either at the

(*k*) *Crosse v. Smith*, 1 M. & S. 545.
But see *Allen v. Edmundson*, 2 Exch. R. 719; 17 L. J., Exch. 291.

(*l*) *Housego v. Cowne*, 2 M. & W. 348.

(*m*) *Lindo v. Undsworth*, 2 Campb. 602.

(*n*) *Smith v. Mallett*, 2 Campb. 209.

(*o*) *Jameson v. Swinton*, 2 Campb. 373; 2 Taunt. 224.

(*p*) *Philips v. Astling*, 2 Taunt. 206.

(*q*) *Treacher v. Hinton*, 4 B. & Ald. 413; and see *Smith v. Thatcher*, 4 B. & Ald. 200.

houses of his friends or agents, they being expressly named in the acceptance, or at banking-houses, or at houses merely described by their number in a certain street. It is most convenient that the same rule should be laid down in all these cases. The most plain and simple rule to lay down is this, that the effect of an acceptance in any of these forms is a substitution of the house, banker, or other person therein mentioned, for the house or residence of the acceptor, and consequently that the presentment at the house or to the party named in the acceptance, is equivalent to presentment at the house of the acceptor. This rule will, I think, be equally applicable to the case of every acceptance, and will be convenient and advantageous to the public." Where a bill is made payable at a banker's in the city of London, it is sufficient to present the bill for payment to a clerk of the banker at the clearing-house (*r*).

It is customary among the London bankers, in their dealings with each other, not to pay any *check* which is presented by or on behalf of another banker, after four o'clock in the afternoon; but merely to give an answer to the person so presenting it, whether it is a good check or not; and in case the check is approved, a mark is made on it, either by the person presenting it, or the person who gives the answer; and a check so marked is considered as entitled to a priority of payment on the next day. It is not necessary to present a check so marked for payment at the *banking-house* on the next day; it is sufficient if it be presented at the *clearing-house* (*s*). The receiver of a check has till the close of the banking hours on the following day to present it. A debtor paid his creditor by a crossed check; the creditor on the same day transmitted the crossed check to his banker, who negligently (as it was alleged) omitted to present it at the clearing-house in time for that day (when it would have been paid),—on the next day it was dishonoured, the firm on which it was drawn having stopped payment; it was held, that the supposed negligence of the banker, although it might render him liable to his customer, did not discharge the drawer; the holder of a check being entitled, by the general law as above stated, to present it on the day after he receives it, and no custom of the city of London being proved as between debtor and creditor, that a crossed check, if received by the creditor and sent by him to his banker, in sufficient time, must be cleared the same day (*t*). As between the drawer of a check and the holder, no time less than six years is unreasonable for presentment for payment, unless some loss is occasioned to the drawer by the delay (*u*).

A presentment at a *banking-house* after banking hours, when

(*r*) *Reynolds v. Chettle*, 2 Campb. 596; *Halstead v. Skelton*, 5 Q. B. 93.

Ad. 752; *Moule v. Brown*, 4 B. N. C. 268.

(*s*) *Robson v. Bennett*, 2 Taunt. 388.

(*u*) *Laws v. Rand*, 27 L. J., C. P. 76.

(*t*) *Boddington v. Schlenger*, 4 B. &

the house is shut, is not a sufficient presentment to charge the drawer (*x*); but though the presentment be out of banking hours, yet if a person be stationed at the banking-house for the purpose of returning an answer, and he returns for answer "No orders," that is a sufficient presentment (*y*). And presentment at the house where bill was made payable, not a banking-house, at half-past seven, p.m., has been held to have been made at a reasonable time and therefore to be sufficient (*z*).

A person receiving a bill or note payable to the bearer, on demand, on a banker, given by way of payment, if payable in the place where it is given, is not bound to present it until the morning of the next day of business after its receipt; and if payable elsewhere, he is bound to send it by the post of the day next following that on which it was given him (*a*). Where the holder of a bill of exchange intends to sue any of the indorsers, it is incumbent on him first to demand payment from the acceptor; or, in the case of a promissory note, from the maker (*b*), on the day when the bill becomes due, and in case of refusal, to give due notice of dishonour, within a reasonable time, to the indorser (*c*). The general rule seems to be, with respect to persons living in the same town, that the notice shall be given so as to be received in the course of the next day (*d*), and with regard to such as live at different places, that it shall be sent by the next post. "It is," said *Abbott, C. J.*, in *Williams v. Smith*, 2 B. & Ald. 500, "of the greatest importance to commerce that some plain and precise rule should be laid down to guide persons in all cases as to the time within which notices of the dishonours of bills should be given. That time I have always understood to be the departure of the post on the day following that in which the party receives the intelligence of the dishonour. If instead of that rule we were to say that the party must give notice by the next practicable post, we should raise in many cases difficult questions of fact, and should, according to the peculiar local situations of parties, give them more or less facility in complying with the rule. But no dispute can arise from adopting the rule which I have stated." A country banker, with whom a bill of exchange made payable in London is deposited, is considered as a distinct holder, and has an entire day after receiving notice of its dishonour to transmit the same to his customer, so that notice by the next day's post, though it be not the next post, will be time enough (*e*). It is not necessary to make any demand on the drawer of a bill (*f*).

(*x*) *Elford v. Teed*, 1 M. & S. 28.

(*y*) *Garnett v. Woodcock*, 6 M. & S. 44.

(*z*) *Wilkins v. Judis*, 1 M. & Rob. 41;
see *Curlewis v. Corfield*, 1 Q. B. 814; 1
G. & D. 489.

(*a*) *James v. Holditch*, MS., and 8 D.
& R. 40.

(*b*) *Collins v. Butler*, 2 Str. 1087.

(*c*) *Rushton v. Aspinall*, Dougl. 679.

(*d*) *Tindal v. Brown*, 1 T. R. 167;
Haynes v. Birks, 3 B. & P. 599.

(*e*) *Darbishire v. Parker*, 6 East, 3;
Langdale v. Trimmer, 15 East, 291.

(*f*) *Heylyn v. Adamson*, 2 Burr. 678.

The notice must contain an intimation that payment has been refused by the acceptor; for a letter merely containing a demand of payment has been held not to be a sufficient notice (*g*). So a letter from the holder to indorser, threatening legal measures unless bill be paid, has been decided by the House of Lords, confirming the judgment of the Exchequer Chamber, not to amount to notice of dishonour by the acceptor (*h*). In delivering the judgment of the Exchequer Chamber in *Solarte v. Palmer*, *Tindal*, C. J., said, "The notice of dishonour, which is commonly substituted in this country in the place of a formal protest (such formal protest being essential in other countries to enable the plaintiff to recover), most certainly does not require all the precision and formality which accompanied the regular protest, for which it has been substituted. But it should, at least, inform the party to whom it is addressed, either in express terms or by necessary implication, that the bill has been dishonoured, and that the holder looks to him for payment of the amount. Looking at this notice, we think no such intimation is conveyed in terms, or is necessary to be inferred from its contents." With reference, however, to the words "necessary implication" used in the above judgment, *Parke*, B., in a subsequent case observed, "it seems to me enough if it appear by reasonable intendment, and would be inferred by any man of business that the bill had been presented to the acceptor and not paid by him" (*i*). So a notice of dishonour is insufficient, if it merely state that the bill has not been paid when due (*k*). But the holder of a bill of exchange need not in terms inform the party to whom he gives notice of dishonour that he looks to him for payment (*l*).

If a bill be accepted, payable at a particular place, proof of a demand at that place was held sufficient, without proof of notice to the acceptor of non-payment (*m*). Where the residence of the indorser is unknown to the holder, if due diligence be used in discovering the place of residence, and notice is given as soon as that is discovered, it is sufficient (*n*). The indorsee of a bill dishonoured by the acceptor, being ignorant of the place of residence of one of the indorsers, employed an attorney to give notice to him and the other prior indorsers; the attorney, having received information of the indorser's residence, on the following day, consulted his client,

(*g*) *Hartley v. Case*, 4 B. & C. 339.

(*h*) *Solarte v. Palmer*, 1 B. N. C. 194; 5 M. & Sc. 1; 2 Cl. & F. 93; 8 Bli. N. R. 874. In *Everard v. Watson*, 1 E. & B. 101, *Campbell*, C. J., expressed his regret at the decision in *Solarte v. Palmer*.

(*i*) *Hedger v. Steavenson*, 2 M. & W. 799.

(*k*) *Mier v. Brown*, 11 M. & W. 372, recognizing *Furze v. Sharwood*, 2 Q. B. 388, and *King v. Bickley*, 2 Q. B. 419;

2 G. & D. 116.

(*l*) *Furze v. Sharwood*, 2 Q. B. 388. In the cases of *Armstrong v. Christiani*, 17 L. J., C. P. 181; 5 C. B. 687, and *Everard v. Watson*, 1 E. & B. 801, all the authorities on this point were cited and considered. See also *Paul v. Joel*, 28 L. J., Exch. 143.

(*m*) *Edwards v. Dick*, 4 B. & A. 212.

(*n*) *Bateman v. Joseph*, 12 East, 433; *Buxton v. Jones*, 1 M. & Gr. 83.

and on the third day gave notice of dishonour; it was held sufficient (o).

As the rule requiring notice is introduced for the benefit of the party to whom such notice is given, of course it may be waived by that party. *Quilibet potest renunciare juri pro se introducto*. In some cases the rule is dispensed with, as where the drawer has not any effects in the hands of the acceptor; for then the drawer is presumed to have notice that the bill will not be paid; besides, not having any effects to withdraw from the hands of the acceptor, he cannot sustain any injury from the want of notice (p). But if a bill be drawn for the accommodation, not of the drawer, but of the acceptor, as the drawer might sue the acceptor he is entitled to notice (q). Where a bill was drawn for the accommodation of an indorsee, and neither such indorsee nor the drawer had any effects in the hands of the acceptor, it was held that a subsequent indorsee, in order to recover against the drawer, was bound to give him notice; for the drawer had a remedy over against his immediate indorsee (r). Formerly it was held that the circumstance of the *indorser* having effects in the hands of the acceptor would not entitle the drawer to notice, if the drawer has not any effects in the hands of the acceptor. A notice of dishonour is not required in the case of a promissory note indorsed by defendant, but not made payable to order, the note having been dishonoured by the maker (s).

From the circumstance of part payment of a bill without any objection to the want of notice or a promise to pay the amount thereof, a jury may be directed to presume that notice was regularly given (t), or that it has been waived (u).

Protest.—In addition to notice of dishonour, it is necessary for the holder, in the case of a foreign bill, to protest it for non-payment: but where there has been a promise of payment, after the bill became due, such promise supersedes the necessity of proving protest (x). It is not necessary in the case of a promissory note (y). Where the drawer of a foreign bill of exchange, at the time of the drawing, was in a foreign country, but returned home before it became due, at which time it was dishonoured and protested, but notice of the dishonour only, and not of the protest, was left at the drawer's house; it was held, that this was sufficient (z). And

(o) *Firth v. Thrush*, 8 B. & C. 387; *Allen v. Edmundson*, 17 L. J., Exch. 294.

(p) See *ante*, p. 288.

(q) *Cory v. Scott*, 3 B. & Ald. 619; *Sleigh v. Sleigh*, 19 L. J., Exch. 345; 5 Exch. R. 514.

(r) *Cory v. Scott*, *supra* (overruling *Walwyn v. St. Quentin*, 1 B. & P. 652); *Norton v. Pickering*, 8 B. & C. 610.

(s) *Plimley v. Westley*, 2 B. N. C. 249.

(t) *Horford v. Wilson*, 1 Taunt. 12; *Hicks v. Duke of Beaufort*, 4 B. N. C. 229; and see *Bronnell v. Bonney*, 1 Q. B. 39.

(u) *Cordery v. Colvin*, 14 C. B. (N. S.) 374; 32 L. J., C. P. 210.

(x) *Gibbon v. Coggan*, 2 Campb. 188.

(y) *Bonar v. Mitchell*, 5 Exch. R. 415; 19 L. J., Exch. 302.

(z) *Robins v. Gibson*, 1 M. & S. 288.

it has since been decided that in all cases it is sufficient to inform the drawer that the bill has been protested for non-payment, without sending him a copy of the protest (*a*). It appears from a passage, extracted from the case of *Tassell v. Lewis*, Lord Raym. 743, that this protest ought to be made on the last day of grace. This strictness, however, is not observed in practice. The modern usage is for the notary to make a minute on the bill, consisting of his initial, the day, month and year when payment was refused, and charges for making the minute. This minute, which is called noting, is unknown in the law as distinguished from the protest. The notary, having made his minute, draws up the protest at his leisure. In Buller's *Nisi Prius*, p. 272, it is said "That the use of noting is, that it should be done the very day of refusal, and the protest may be drawn any day after by the notary, and be dated on the day the noting was made." The practice certainly is as here stated; but in *Charters v. Bell*, 4 Esp. N. P. C. 48, a question was raised, whether the protest ought not to be drawn on the day on which the bill is dishonoured; and it was contended, that the mere noting the bill on that day, and drawing the protest on a subsequent day, was insufficient. Lord *Kenyon* was of opinion that it was sufficient (*b*); and a new trial having been granted, Lord *Ellenborough* agreed in opinion with Lord *Kenyon*. A case was then reserved for the opinion of the court; and after argument, the court, conceiving the question to be of great importance, directed it to be turned into a special verdict. But the sum in dispute being very small, and the parties unwilling to incur the expense of a special verdict, the recommendation of the court was not attended to, and the case was not mentioned again.

The protest must be stamped (*c*). The protest for non-payment on inland bills of exchange is regulated by the statute 9 & 10 Will. III. c. 17; and for non-acceptance, by the 3 & 4 Anne, c. 9. At common law a protest was not required on such bills; and as the statutes are not obligatory (*d*), and the power of protesting given by them is attended with very few advantages, it is not very frequently exercised.

Doubts having arisen as to the place in which it is requisite to protest for non-payment of bills of exchange, which on the presentment for acceptance to the drawees may not have been accepted, such bills being made payable at a place other than the place mentioned therein to be the residence of the drawees, it was for the removal of such doubts enacted, by stat. 2 & 3 Will. IV. c. 98, that all bills of exchange wherein the drawers shall have expressed that such bills are to be payable in any place other than the place by them therein mentioned to be the residence of the drawees, and which shall not on the presentment for acceptance thereof be ac-

(*a*) *Goodman v. Harvey*, 4 A. & E. 870.

(*b*) *Acc. Geralopulo v. Wieler*, 10 C. B.

690; 20 L. J., C. P. 105.

(*c*) 55 Geo. III. c. 184, Sched. Protest.

(*d*) *Windle v. Andrews*, 2 B. & Ald.

696.

cepted, shall or may be, without further presentment to the drawees, protested for non-payment in the place in which such bills shall have been by the drawers expressed to be payable, unless the amount owing upon such bills shall have been paid to the holders on the day on which such bills would have become payable had the same been duly accepted.

Bills of exchange had been occasionally accepted *supra protest* for honour, or had a reference thereon in case of need; doubts having arisen as to the day on which it was requisite to present for payment such bills to the acceptors for honour, or referees, by stat. 6 & 7 Will. IV. c. 58, s. 1, it was declared and enacted, that it shall not be necessary to present such bills to such acceptors for honour, or to such referees, until the day following the day on which such bills shall become due; and if the place of address on such bill, or such acceptance for honour, or such referee, shall be in any city, town, or place, other than in the city, &c., where such bill shall be therein made payable, then it shall not be necessary to forward such bill for payment until the day following the day on which such bill shall become due; and by sect. 2, if the day following the day on which such bill shall become due shall be Sunday, Good Friday, or a fast or thanksgiving, then the day following such Sunday, &c., will be sufficient.

Non-payment of Checks.—The holder of a check is not bound to give notice of its dishonour to the drawer, for the purpose of charging the person from whom he received it. It is sufficient, if he presents it with due diligence to the bankers on whom it is drawn, and gives due notice of its dishonour to those against whom he seeks his remedy. If a banker in London receives a check, by the general post, one day, and presents it for payment the next day, he will be considered as having used due diligence (e). “The result of the cases, from *Rickford v. Ridge*, to *Boddington v. Schlencker* (f), is, that the party receiving a check has till the following day to present it, where there are the ordinary means of doing so” (g). “The presentment should not be delayed beyond the next day” (h).

Where a check drawn by a customer on a banker, for a sum of money described in the body of the check in words and figures, was afterwards altered by the holder, who substituted a larger sum for that mentioned, but in such a manner that no person in the ordinary course of business could observe it, and the banker paid to the holder this larger sum; it was held, that the banker could not charge the customer for anything beyond the sum for which the check was originally drawn (i). A customer of a banker delivered to his wife certain printed checks signed by himself, but

(e) *Rickford v. Ridge*, 2 Campb. 537.

(f) 4 B. & Ad. 752, *ante*, p. 305.

(g) *Per Tindal, C. J.*, in *Moule v.*

Brown, 4 B. N. C. 268.

(h) *Per Park, J.*, *S. C.*

(i) *Hall v. Fuller*, 5 B. & C. 750.

with blanks for the sums, requesting his wife to fill the blanks up according to the exigency of his business; and she caused one to be filled up with the words, fifty pounds, two shillings, the fifty being commenced with a small letter and placed in the middle of the line and the figures, 50*l.* 2*s.*, being placed at a considerable distance from the printed £. In this state the wife delivered the check to her husband's clerk to receive the amount; instead of which he inserted at the beginning of the line in which the word *fifty* was written, the words *three hundred and*, and the figure 3 between the £ and the 50*l.* The bankers having paid the 350*l.* 2*s.*; it was held, that the loss must fall on the customer; for it was the fault of the customer, who ought to have selected for the care of such a check a person conversant with business as well as trustworthy, who would have guarded against fraud in the mode of filling up the check (*k*). It was formerly held that a post dated check was absolutely void, and could not be received in evidence for any purpose (*l*); but now a check intentionally post dated is held to have the legal effect of a bill of exchange at so many days date (*m*).

Crossed Checks.—The effect of crossing a check at common law was to direct the bankers, the drawees, to pay the check to some banker. The crossing did not constitute a part of the check, but the holder might erase the name of the banker and substitute that of another banker. If a banker paid a crossed check otherwise than through a banker, it was strong evidence of negligence on his part so as to make him responsible to his customer (*n*). But the 19 & 20 Vict. c. 25, s. 1, enacts, that “in every case where a draft on any banker made payable to bearer, or to order on demand, *bears* across its face an addition in written or stamped letters, of the name of any banker, or of the words ‘and Company,’ in full or abbreviated, either of such additions shall have the force of a direction to the bankers upon whom such draft is made, that the same is to be paid only to or through some banker, and the same shall be payable only to or through some banker.”

In a case upon this statute in which a cross check which had been lost had the crossing afterwards erased, and the bankers paid it therefore to the person who presented it for payment,—the jury having found that neither the customer nor the bankers were guilty of negligence, the Court of Common Pleas held that the crossing was no part of the check, and that the loss must fall upon the customer (*o*).

After this decision, the 21 & 22 Vict. c. 79, was passed, by the

(*k*) *Young v. Grote*, 4 Bingh. 253.

(*l*) *Serle v. Norton*, 9 M. & W. 309.

(*m*) *Forster v. Mackreth*, 36 L. J., Ex. 94; and see cases there quoted.

(*n*) *Stewart v. Lee*, 1 M. & M. 158;

Bellamy v. Marjoribanks, 7 Ex. 389;

Caslon v. Ireland, 25 L. J., Q. B. 113.

(*o*) *Simmonds v. Taylor*, 27 L. J., C. P. 248; 4 C. B. (N. S.) 463.

first section of which it is enacted that "when a check, &c., shall be issued crossed," the crossing shall be deemed a material part of a check or draft. By the second section the lawful holder of a check, &c., uncrossed or crossed "and company," may cross the same with the name of a banker, which crossing becomes a material part of the check. By the fourth section, a banker is not to be responsible for paying a check, &c., which does not plainly appear to have been crossed or altered, unless he shall act *malâ fides*, or be guilty of negligence.

The law, therefore, of crossed checks, is now as follows: The drawer may cross a check with the name of a banker, or with the words, "and Co.," which crossing forms a material part of the check, and cannot be altered, except that in the latter case a lawful holder may fill up the name of a banker. When the first form of crossing is used, the banker must pay through the particular banker named by the drawer. When the second, the banker must pay through a banker who may be named by a lawful holder. When a check is drawn uncrossed, a lawful holder may cross it with a particular banker's name, which crossing then becomes a material and unalterable part of the bill. A banker is protected when he pays an altered check *bonâ fide* and without negligence.

VII. *Of the Acts of the Holder whereby the Parties to the Bill may be discharged.*

If the holder enter into a composition with the acceptor, he thereby discharges the other parties to the bill unless he has previously obtained their assent, or unless remedies against them are reserved (*p*). So if the indorsee receive part payment from the acceptor, and take from him a security for the remainder, with the exception of a nominal sum, the indorser is discharged (*q*). Receipt of part of the money from an acceptor will not discharge the drawer, if timely notice be given that the bill is not duly paid. Bull. N. P. 271. Although there are some cases to the contrary (*r*), the better opinion would seem to be that, notwithstanding the receipt of part from the indorser, the holder may recover the whole amount of the bill from the drawer, the holder then becoming trustee for the drawer as to such part (*s*). Where the holder, after receiving part payment from the acceptor, agreed to take a new acceptance from him for the remainder, payable at a future date, and that in the mean time the holder should keep the original bill in his hands as a security; it was held, that such agreement amounted to giving time and a new credit to the acceptor, and discharged the indorser, who was not a party

(*p*) *Ex parte Smith*, Co. B. L. 5th edit. pp. 168, 169; 3 Bro. Ch. C. 1; *Kearsley v. Cole*, 16 M. & W. 128. See *infra* p. 315.

(*q*) *English v. Darley*, 2 B. & P. 61. See the opinion of *Eldon*, C. J.

(*r*) *Bacon v. Searles*, 1 H. Bl. 88. See *Purssord v. Peek*, 9 M. & W. 196

(*s*) *Johnson v. Kennion*, 2 Wils. 262; *Walwyn v. St. Quintin*, 1 B. & P. 652; and see *Jones v. Broadhurst*, 9 C. B. 173.

to such agreement (*t*). And it has been held, that in such a case the holder cannot sue till the second bill has become due (*u*).

But a mere forbearance to sue the acceptor after protest for non-payment, and notice, or what is equivalent to notice, thereof to the drawer, will not discharge the drawer (*x*). If the executor of the acceptor verbally promise to pay the holder out of his own estate, provided the holder forbear to sue, and he forbears accordingly, the drawer is not thereby discharged, inasmuch as the promise of the executor, not being in writing, is void by the Statute of Frauds, and, consequently, the holder does not derive from such promise any better security than the bill had given him (*y*).

A bill of exchange having been dishonoured, the acceptor transmitted a new bill for a larger amount to the payee, but had not any communication with him respecting the first. The payee discounted the second bill with the holder of the first, which he received back as part of the amount, and afterwards, for a valuable consideration, indorsed it to plaintiff: it was held, that the second bill was merely a collateral security, and that the receipt of it by the payee did not amount to giving time to the acceptor of the first bill so as to exonerate the drawer (*z*). The cases *Ex parte Smith*, and *English v. Darley*, seem to have proceeded on a principle of law resulting from the relation in which the acceptor of a bill of exchange may be considered as standing with respect to the other parties. Although by his acceptance he only undertakes to pay the debt of another, *viz.*, of the drawer, yet he is primarily liable; for it is incumbent on the holder of the bill to resort to him in the first instance. Under this view, although his engagement is really only a collateral engagement, yet he may in this respect be considered as the principal debtor, and the remaining parties as sureties only. Now, in the case of simple contracts, if a creditor give time to the principal debtor, the collateral sureties are discharged both in law and equity (*a*). The acceptor is considered the principal debtor, even in the case of a bill drawn for the accommodation of the drawer. Where, therefore, the holder of a bill of exchange, accepted for the accommodation of the drawer, took a *cognovit* from the drawer for payment by instalments, it was held, that he did not thereby discharge the acceptor (*b*).

H. accepted a bill for the accommodation of B., the drawer, who indorsed it over as a security for a debt, and afterwards became bankrupt. The indorsee entered into an agreement with the as-

(*t*) *Gould v. Robson*, 8 East, 576.

(*u*) *Kendrick v. Lomax*, 2 Tyrw. 447.

(*x*) 2nd Resolution in *Walwyn v. St. Quintin*, 1 B. & P. 652.

(*y*) *Philpot v. Briant*, 4 Bingh. 717; 1 M. & P. 754.

(*z*) *Pring v. Clarkson*, 1 B. & C. 14.

(*a*) *Pooley v. Harradine*, 7 E. & B. 431; 26 L. J., Q. B. 156; *Strong v. Foster*, 17

C. B. 201; 25 L. J., C. P. 201; *per Williams, J.*, *Rees v. Berrington*, 2 W. & Tudor, L. C. 814.

(*b*) *Fentum v. Pocock*, 5 Taunt. 192; *Nichols v. Norris*, 3 B. & Ad. 41, n. See also *Woodhouse v. Farebrother*, 23 L. J., Q. B. 22. As to the rule in equity, see *Hollier v. Eyre*, 9 Cl. & F. 45; *Strong v. Foster*, 17 C. B. 201.

signees for purchasing part of the bankrupt's property, and for the arrangement of some claims, which he, the indorsee, had upon the estate, and he afterwards gave them a release of all demands, no mention being made of the bill which had been dishonoured. He knew at the time of the agreement, but not when he took the bill, that it was accepted for accommodation. It was held, that the acceptor was liable (c). One of the makers of a joint promissory note may show that he was a mere surety for the other party, and so known to the payee, and that the payee had taken a composition from the principal debtor, without his (the surety's) consent (d).

The doctrine laid down in *Exp. Smith*, and *English v. Darley*, must be confined to those cases in which the agreement between the holder and acceptor is made without the consent of the other parties to the bill, for otherwise they will not be discharged. This appears from the case of *Clark and others, Executors of Moles v. Devlin* (e), in which it was adjudged that the drawer of a bill who had assented to the holder's taking a security from the acceptor, was, notwithstanding such security, liable to an action at the suit of the holder. The holder of a bill, on its becoming due, allowed the acceptor to renew it without consulting the indorser; but the indorser afterwards meeting the acceptor, told him that it was the *best thing that could be done*; it was held, that this was not a recognition of the terms granted by the holder to the acceptor, and that the indorser was discharged (f). The holder may sue a *prior* indorser, although he has taken in execution a subsequent indorser, and afterwards let him go at large on a letter of licence, without having paid the debt (g). In a case where an action was brought by several partners, as indorsees of a promissory note against the defendant as indorser, and it appeared in evidence, that one of the partners had discharged a *prior* indorser, by a deed of composition; it was held, that such deed operated as a release to the defendant. "If a holder enter into an agreement with a *prior* indorser in the morning, not to sue him for a certain period of time, and then oblige a *subsequent* indorser in the evening to pay the debt, the latter must immediately resort to the very person for payment to whom the holder has pledged his faith that he shall not be sued. In the case *Exp. Smith*, Lord Thurlow, after consulting with all the judges, was of opinion, that the holder of a bill, by entering into a composition with the acceptor, discharged the indorser, and accordingly ordered the proof against the estate of the latter to be expunged, proceeding on the ground of the

(c) *Harrison v. Courtauld*, 3 B. & Ad. 36. See *Pooley v. Harradine*, 7 E. & B. 431; 26 L. J., Q. B. 156.

(d) *Hall v. Wilcox*, 1 M. & Rob. 58.

(e) 3 Bos. & Pul. 363.

(f) *Withall v. Masterman & Co.*, 2

Campb. 179.

(g) *Hayling v. Mullhall*, 2 Bl. R. 1235, the marginal note of which is incorrect; *Ellison v. Dezell*, Bristol Sum. Ass. 1811, MS.

acceptor's liability being varied by the act of the holder. "We all remember the case where Mr. Richard Burke, being security for an annuity, the grantee gave time to the principal, and yet argued that Mr. Burke was not relieved thereby, though the principal was; but it was answered that the grantee could make no demand upon the surety, because he must, by so doing, enforce a payment from the principal contrary to the agreement." *Per Lord Eldon, C. J. (h)*. In the foregoing cases, the act done by the creditor is his own act, over which the surety has not any control; and the injury which the surety would receive, is one which he has not any mode of preventing. But a surety for a bankrupt is not discharged by the creditor's signing the bankrupt's certificate, even after notice from the surety not to do so. "It is the duty of the surety to pay the debt: and if he declines so doing, and thereby permits the creditor to prove, the signing the certificate, of conformity, which is a power given to the proving creditor, cannot be considered as an act done by the creditor, which altered the surety's right without his control, and scarcely, indeed, without his consent." *Per Tindal, C. J. (i)*. But where the indorsee of a note made by the defendant for the accommodation of the payee and indorser covenanted not to sue the payee and indorser, it was held, that the defendant could not avail himself of this covenant, in an action brought against him by the indorsee, although the defendant, by the verdict against him in this action, would have a right to recover over against the payee and indorser (*k*).

Giving time to the principal debtor will not discharge the surety, if there be an agreement between the principal debtor and the creditor that it shall not have that effect, although the surety himself be no party to the stipulation. "The reason," said *Patteson, J.*, "why a release to one debtor releases all jointly liable, is, because unless it was held to do so, the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released: but that reason does not apply where the debtor released agrees to such a qualification of the release as will leave him liable to any rights of the co-debtor" (*l*). The reserve of remedies prevents the discharge of a surety, because the rights of the surety against the principal debtor are not impaired thereby, the consent of the debtor that the creditor shall have recourse against the surety being impliedly a consent that the surety shall have recourse against him (*m*).

(*h*) *English v. Darley*, 2 Bos. & Pul. 62. See also *Bank of Ireland v. Beresford and another*, 6 Dow. 234.

(*i*) Delivering judgment. *Browne v. Carr*, 7 Bing. 508.

(*k*) *Mallett v. Thompson*, 5 Esp. N. P. C. 178.

(*l*) *North v. Wakefield*, 13 Q. B. 258; and see *Owen v. Horman*, 4 H. L. Cas. 997, and *Kearsley v. Cole*, 16 M. & W. 128. See, however, cases in note (*a*) p. 313.

(*m*) *Per Parke, B.*, *Kearsley v. Cole*.

VIII. *Of the Action on a Bill of Exchange:—**Declaration*, p. 316.*Pleas*, p. 319.*Evidence*, p. 321.*Recovery of Interest*, p. 325.

A bill of exchange being a simple contract, the form of action which, previously to the Common Law Procedure Act, was usually adopted for the recovery of the sum of money mentioned in the bill in case of non-acceptance or non-payment was a special assumpsit. The action of debt only lay when there was a privity of contract between the parties. But now, by the Common Law Procedure Act, the distinction between forms of action is substantially abolished (*n*).

Declaration.—The bill of exchange should be described either by setting it out or by stating its legal effect.

Formerly the declaration extended to a great length; but under the pleading rules, T. T. 1 Will. IV. (*o*), concise forms are given on notes and inland bills, according to the principle of which, declarations on foreign bills may be drawn with the necessary variations. See these forms; but it must be remembered that these rules were made before the Uniformity of Process Act, 2 Will. IV. c. 39; and the forms given by them, which were correct in actions by bill (because then the declaration was the commencement of the suit), are so no longer (*p*), the suing out the writ being now the com-

(*n*) By stat. 18 & 19 Vict. c. 67, which was passed with the object of putting a stop to frivolous or vexatious defences to actions on bills of exchange and promissory notes, all actions upon bills of exchange or promissory notes commenced within six months after the same shall have become payable, may be by writ of summons in the form given by the act; and the plaintiff, on filing affidavit of personal service, may at once sign final judgment as in the form likewise given. It is enacted, however, by sect. 2, that a judge "shall, upon application within the period of twelve days from such service, give leave to appear to such writ, and to defend the action, on the defendant paying into court the sum indorsed on the writ, or upon affidavits, satisfactory to the judge, which disclose a legal or equitable defence, or such facts as would make it incumbent on the holder to prove consideration, or such other facts as the judge may deem sufficient to support the application, and on such terms as to se-

curity or otherwise as to the judge may seem meet. And sect. 3 enacts, that "after judgment the court or a judge may under special circumstances set aside the judgment, and, if necessary, stay or set aside execution, and may give leave to appear to the writ and to defend the action, if it shall appear to be reasonable to the court or judge so to do, and on such terms as to the court or judge may seem just." See *Hall v. Coates*, 25 L. J., Exch. 3; *Robinson v. Cotterell*, 25 L. J., Exch. 4; and Reg. Gen. Nov. 26, 1855. As to the power of amendment where proceedings have been wrongly taken under this act, see *Leigh v. Baker*, 26 L. J., C. P. 220. See Reg. Gen. M. T. 1855; 17 C. B. 1; 25 L. J. c. vi. Rule H. T. 1858; 3 C. B. (N. S.) 620.

(*o*) 2 B. & Ad. 783; 7 Bingh. 774; 5 M. & P. 813; 1 Cr. & J. 468; 1 Tyrw. 520.

(*p*) *Per Parke, B.*, in *Abbott v. Aslett*, 1 M. & W. 209.

mencement of the suit. The days of grace need not be noticed (*g*). The frequent nonsuits, which used to occur on the ground of variances between the instrument as set forth in the declaration, and that produced in evidence, were greatly obviated by the stat. 9 Geo. IV. c. 15, and the stat. 3 & 4 Will. IV. c. 42, s. 23: and now, by the statutes 15 & 16 Vict. c. 76, s. 222, and 17 & 18 Vict. c. 125, s. 96, power is given to make all amendments which may be necessary for the purpose of determining in the existing suit the real question in controversy between the parties (*r*). Concise forms for declaration upon Bills of Exchange are given by Common Law Procedure Act, 1852, schedule B. 17. Where the declaration was on a promissory note for 250*l.* made by the defendant, dated the 9th of November, 1838, payable to plaintiff or order on demand: plea, that defendant did not make the note; and the proof was of a joint and several promissory note for 250*l.*, made by defendant and his wife, dated the 6th of November, 1837, payable 12 months after date, and no proof was given of any other note between the parties; this was considered to be a variance properly amended at N. P. under 3 & 4 Will. IV. c. 42, s. 23 (*s*). The words "now overdue" in the form of declarations on bills of exchange given by Common Law Procedure Act, 1852, are part of the description of the bill, and are put in issue by the plea of *non-acceptavit*. The plaintiff is bound on such an issue to produce at the time a bill overdue at the time of action brought (*t*). Where the acceptance was written before the bill was drawn, the declaration described the transaction in the usual order of time, *viz.*, the drawing first, and then the acceptance; this was held not to be a variance (*u*). And so with respect to an indorsement, whether made before (*x*) bill drawn or after (*y*) bill became due.

By stat. 1 & 2 Geo. IV. c. 78, s. 1, if any person shall accept a bill payable at the house of a banker, or other place, without further expression in his acceptance, such acceptance shall be deemed, to all intents and purposes, a general acceptance of such bill, and such a bill may, in an action upon it, be declared upon as made payable at that place; although, under this statute, such an acceptance amounts to a general acceptance (*z*). But if the acceptor shall, in his acceptance, express that he accepts the bill payable at a banker's house or other place *only*, and *not otherwise or elsewhere*, such acceptance shall be deemed *to be*, to all intents and purposes, a qualified acceptance, and the acceptor shall not be liable to pay the said bill, except in default of payment, when such payment shall have been duly demanded at such banker's house or

(*g*) *Padwick v. Turner*, 11 Q. B. 124.

(*r*) See *Leigh v. Baker*, 26 L. J., C. P. 220.

(*s*) *Beckett v. Dutton*, 7 M. & W. 157.

(*t*) *Hinton v. Duff*, 31 L. J., C. P. 199.

(*u*) *Molloy v. Delves*, 7 Bingh. 428; 5

M. & P. 275.

(*x*) *Russel v. Langstaffe*, Doug. 514.

(*y*) *Young v. Wright*, 1 Campb. 139.

(*z*) *Blake v. Beaumont*, 4 M. & Gr. 7; *S. C. Blake v. Bowman*, 5 Scott's N. R. 617.

other place. Since this statute it has been adjudged, that the holder of a bill accepted, payable at a banker's, but omitting the words "there only," is not bound to present it at the banker's, and consequently is not guilty of laches, if he omits to do so; and may still recover against the *acceptor*, in the event of the banker's failure, although a considerable time, *e.g.* three weeks, have elapsed since the bill became due, during all which time the acceptor had funds in the banker's hands, exceeding the amount of the bill (a). In such case no averment or proof of presentment for payment at the place mentioned is necessary (b). But in an action against the *drawer* of a bill (payable at a *particular* place, where the drawee accepts it as payable at that place), on the ground of non-payment by the acceptor, it is necessary to prove a presentment to the acceptor at that place; for the statute neither intended to alter, nor has it altered, the liability of *drawers*; but is confined in its operation to *acceptors* only (c).

A conditional acceptance cannot be declared on as an absolute acceptance, even after condition performed (d). In action on a bill against an acceptor for the honour of the drawer, it must be alleged, that when the bill arrived at maturity, it was presented to the drawee for payment. And this rule holds whether the bill be a bill payable after date (e) or after sight (f). Where a bill has been accepted by the drawee, if another person accepts it also for the purpose of guaranteeing the first acceptor, the second acceptance is merely a collateral undertaking, and must be declared on as such; for there is not any custom of merchants authorizing a series of acceptors (g).

Facts dispensing with presentment or notice must be specially averred in the declaration. "I always thought that if presentment or notice was to be excused on the ground of want of effects, &c., that fact ought to be stated in the declaration." *Per Parke, B.* (h).

Where it was averred that the defendants accepted the bill, and the acceptance was by an agent thus, "for Heseltine and Co., John Wilson:" Lord *Ellenborough* was of opinion, that the evidence supported the declaration: observing, that if the defendants accepted the bill by an agent, in contemplation of law they accepted it themselves: and it was a general rule in pleading, that facts might be stated according to their legal effect (i).

When the action is brought between the immediate parties to

(a) *Turner v. Hayden*, 4 B. & C. 1.

(b) *Selby v. Eden*, 3 Bingh. 611; *Fayle v. Bird*, 6 B. & C. 531; *Halstead v. Skelton*, 5 Q. B. 92.

(c) *Gibb v. Mather*, 8 Bingh. 214. See *Boydell v. Harkness*, 3 C. B. 168.

(d) *Langston v. Corney*, 4 Campb. 176.

(e) *Hoare v. Cazenove*, 16 East, 391.

(f) *Williams v. Germaine*, 7 B. & C. 468.

(g) *Jackson v. Hudson*, 2 Campb. 447.

(h) *Burgh v. Legge*, 5 M. & W. 421; and see *Carter v. Flower*, 16 M. & W. 743; 16 L. J., Exch. 199.

(i) *Heys v. Heseltine*, 2 Campb. 604.

the bill, it is usual to subjoin such counts as will embrace the consideration for which the bill has been given: for as the bill does not merge the original demand, if the plaintiff fail in substantiating in evidence the special count, he may resort to evidence on the common counts. Under the new rules, counts upon a bill or note, and for the consideration in goods, money, or otherwise, are considered as founded on distinct subject-matters of complaint. Where a promissory note had been given for money lent, which when produced in court was unstamped, Lord *Kenyon*, C. J., permitted the plaintiff to recover on a common count for money lent, by proving that when the money for which the note had been given was demanded of the defendant, he acknowledged the debt (*k*). Where a declaration in assumpsit contained three counts; the first two on promissory notes for 50*l.* each, and the third for 100*l.* on an account stated, and the particulars of demand stated, "This action is brought to recover the sum of 50*l.*, being the amount of the promissory note in the first count of the declaration mentioned, and also the further sum of 50*l.*, the amount of the promissory note in the second count mentioned;" and then stated that the plaintiff would avail himself of the whole or any part of the declaration: and no evidence of the notes was given at the trial, but a conversation with the defendant was proved, in which he acknowledged he owed the plaintiff 100*l.*: it was held, that the particulars were insufficient to enable the plaintiff to recover; and that in order to do so, he was bound to prove an admission, or an account stated with reference to the promissory notes (*l*). If the plaintiff's particular conveys the requisite information to the defendant, however inaccurately it may be drawn up, it is sufficient, unless the defendant will undertake to swear that he has been misled by the inaccuracy (*m*). And although the general rule is, that the plaintiff who has delivered an imperfect particular, shall be restricted in his evidence, and not permitted to recover anything ultra the contents of such particular, yet if the defendant, in attempting to defeat the restricted claim of the plaintiff, gives him a better case than he was at liberty to make for himself, he will be entitled to a verdict for all that is proved due to him; what he could not have insisted on as a right, he may receive as a boon (*n*).

Pleas.—In all actions upon bills of exchange and promissory notes, the plea of "non-assumpsit" and "never indebted" is inadmissible. In such actions, therefore, a plea in denial must traverse some matter of fact; *ex. gr.* the drawing, or making, or indorsing,

(*k*) *Tyte v. Jones*, 1 East's R. 58, n. (*a*);
Wilson v. Kennedy, 1 Esp. N. P. C. 245,
S. P.

(*m*) *Day v. Bower*, *Ellenborough*, C. J.,
 1 Campb. 69, n.

(*l*) *Roberts v. Elsworth*, 10 M. & W.
 653.

(*n*) *Hurst v. Watkis*, *Ellenborough*, C.
 J., 1 Campb. 68.

or accepting, or presenting, or notice of dishonour, of the bill or note (o). Under the rule of H. Term 4 Will. IV., it has been held, that the rule is confined to cases where the action is only on the note, and on the promise contained in or implied by law from it (p). Hence where an executor declared on a note payable to his testator, laying a promise to pay him, the executor, after the death of the testator; it was held, that such promise might be denied by a plea of non-assumpsit (q).

All matters of confession and avoidance, including not only those by way of discharge, but those which show the transaction to be either void or voidable, on the ground of fraud or otherwise, must be specially pleaded, *ex. gr.* illegality of consideration, either by statute or common law, drawing, indorsing, accepting, &c., bills or notes, by way of accommodation, &c. (r). A plea simply, that no consideration was given for the bill or note, although good after verdict (s), was formerly bad on special demurrer. The proper course is to set out the facts showing absence of consideration, with a denial that there was any other consideration (t); and a traverse of these facts, without a traverse of the last averment, is sufficient (u). If, however, upon a plea, that no consideration was given, the replication be, that there was, the onus lies on the defendant to prove that there was not any consideration (x). To a declaration by indorsee against acceptor, the defendant cannot plead that the bill was accepted by him without consideration (y) from the drawer; for such is not inconsistent with plaintiff's legal demand, indorsement *prima facie* importing consideration (z). Assumpsit by the indorsee against the acceptor of a bill. Plea, that the defendant accepted the bill for the accommodation of the drawer, and that the drawer did not give, nor did the defendant receive, any consideration for his accepting or passing the bill; that the drawer indorsed the bill to the plaintiff without any consideration, and that the plaintiff held the bill without consideration; it was held, that the onus probandi lay on the defendant; that where there is not any fraud, or any suspicion of fraud, but the simple fact is as here, the plaintiff is not called upon to prove that he gave value for the bill (a). To a declaration in assumpsit by indorsee against maker of a promissory note, the defendant pleaded, that the note was indorsed and de-

(o) H. T. 16 Vict. 1853, rule 7.

(p) *Per Parke, B.*, in *Timmis v. Platt*, 2 M. & W. 721.

(q) *Timmis v. Platt*, 2 M. & W. 720. See *Donaldson v. Thompson*, 6 M. & W. 316; recognized in *Oridge v. Sherborne*, 11 M. & W. 374.

(r) H. Term, 16 Vict. 1853, rule 8.

(s) *Easton v. Pratchett*, 2 C. M. & R. 542; and see *Crofts v. Beale*, 11 C. B. 172.

(t) *Boden v. Wright*, 12 C. B. 445.

(u) *Atkinson v. Davies*, 11 M. & W. 236.

(x) *Lacey v. Forrester*, 5 Tyr. 567. See *Whitaker v. Edmunds*, 1 A. & E. 638.

(y) *Low v. Chifney*, 1 B. N. C. 267.

(z) *Reynolds v. Iveney*, 3 D. P. C. 453.

(a) *Mills v. Barber*, 1 M. & W. 425; overruling *Heath v. Sansom*, 2 B. & Ad. 291.

livered to the plaintiff by his indorser, in violation of good faith, and in fraud and contempt of an order for referring the claim of that indorser to arbitration, and that the plaintiff took the note with full knowledge of the premises. The plaintiff replied, that he had not, when he took the note, any knowledge of the premises in the plea mentioned. Issue thereon. Upon these pleadings, it was held that the defendant was bound to begin at the trial, and to prove the plaintiff's knowledge of the fraud; and that the plaintiff was not bound in the first instance to prove consideration given for the indorsement to him (b). Where, however, the defendant pleaded that the note declared on was made on an illegal consideration, and that the plaintiff gave no value, upon these allegations being put in issue by the plea; it was held, that it was sufficient for the defendant to prove the illegality, and that being done, the *onus* was cast upon the plaintiff to prove that he gave consideration (c). So also where the plea alleges fraud; upon the defendant proving that allegation, the plaintiff is bound to prove that he gave value (d). When a bill has been altered after acceptance, the defendant may take advantage of it, under a plea that he did not accept the bill declared on (e), but if the plea allege the alteration, the defendant has the right to begin (f). And where the bill is written on paper improperly stamped, the consequence is that it cannot be given in evidence; and this defence is admissible under the plea of non-acceptance (g).

Evidence.—The bill need not be produced at the trial unless there be some issue upon the plaintiff which renders its production necessary (h). Nor can the defendant insist upon its production in support of a plea, unless he has given the plaintiff notice to produce it (i). So the production of the bill may be rendered unnecessary by the defendant having admitted his hand-writing (k). The date of a bill of exchange, unless impeached by evidence, is considered as the true date (l).

In an action by the indorsee of a bill against the acceptor, it is not necessary for the plaintiff to prove the hand-writing of the drawer, for when a bill is presented for acceptance, the acceptor is supposed to look at the hand-writing of the drawer, and on that account he is precluded from disputing it afterwards, and cannot

(b) *Smith v. Martin*, 9 M. & W. 304.
But see *Bingham v. Stanley*, 2 Q. B. 117.

(c) *Bailey v. Bedwell*, 13 M. & W. 73.

(d) *Berry v. Alderman*, 14 C. B. 95;
23 L. J., C. P. 34.

(e) *Cock v. Coxwell*, 2 Cr. M. & R. 291.

(f) *Barker v. Malcolm*, 7 C. & P. 101.

(g) *Dawson v. Macdonald*, 2 M. & W.
26; recognized in *Field v. Woods*, 7 A. &
E. 114.

(h) *Read v. Gamble*, 10 Ad. & Ell.
597 (n.); but see *Fryer v. Brown*, R. &
M. 145, where the declaration contains
money counts only.

(i) *Lane v. Mullins*, 2 Q. B. 254;
Davis v. Barker, 3 C. B. 606.

(k) *Chaplin v. Levy*, 23 L. J., Exch.
117.

(l) *Anderson v. Weston*, 6 B. N. C.
296.

give in evidence even a forgery of such hand-writing (*m*). And if in such an action the acceptor dispute the hand-writing of the drawer by plea, the plaintiff may reply the acceptance by way of estoppel (*n*). But the hand-writing of the first indorser, if the indorsement be traversed, must be proved, because the acceptor is not supposed to look any further than the hand-writing of the drawer (*o*). In an action by indorsee against acceptor, where the defence was, that the acceptance was a forgery; evidence, that a collection of bills, having on them forgeries of defendant's signature, had been in plaintiff's possession, and that some of such bills had been circulated by him, was held inadmissible; distinct proof not having been given, that the bill, on which the action was brought, formed part of the collection; inasmuch as such evidence would have been inadmissible on an indictment for forgery (*p*).

The acceptance of a bill drawn by procuration, admits the drawer's hand-writing and the procuration (*q*). But although the bill be indorsed by the same procuration, the date thereof not appearing, the acceptance does not admit the procuration to indorse (*r*). On proof, first, that J. S. was the confidential clerk of the defendants, and had been introduced by them to their bankers, as one to whom they were to pay the same attention as they would to the defendants themselves: 2nd, that defendants had, in repeated instances, recognised his authority to draw both bills and checks by procuration by them; last, that on three occasions J. S. had *indorsed* bills by procuration for them, on one of which occasions the defendants must have known of it; and in the other two instances, the defendants had received the money raised upon the bills: it was held, that although an authority to draw does not in itself import an authority to indorse, yet the evidence of such authority to draw was not to be withheld from the jury, who were to determine on the whole evidence, whether such authority to indorse existed or not, and from the foregoing facts they might well draw the inference that it did (*s*).

A bill of exchange was shown to the defendant, whose name appeared on the bill as acceptor, and he was asked whether it was his hand-writing; he said it was, and that the bill would be duly paid; Lord *Ellenborough*, C. J., held, that this accredited the bill, and the plaintiff having been thereby induced to take it, the defendant could not set up as a defence that his name, as written on

(*m*) *Jenys v. Fowler*, Str. 946, coram *Raymond*, C. J. Per *Buller*, J., in 1 T. R. 655, S. P. Per *Dampier*, J., in *Bass v. Olive*, 4 M. & S. 13, S. P.

(*n*) *Sanderson v. Collman*, 4 M. & Gr. 209; 4 Scott's N. R. 638.

(*o*) *Smith v. Chester*, 1 T. R. 654; *Cooper v. Lindo*, B. R. London Sittings after M. T. 52 Geo. III, S. P. as to hand-

writing of second indorser being alleged in declaration.

(*p*) *Griffiths v. Payne*, 11 A. & E. 131; 3 P. & D. 107.

(*q*) *Robinson v. Yarrow*, 7 Taunt. 455.

(*r*) S. C.; and see *Parke*, B.'s, judgment in *Beeman v. Duck*, 11 M. & W. 255.

(*s*) *Prescott v. Flinn*, 9 Bingh. 19.

the bill, was a forgery (*t*). A forged bill was drawn upon the plaintiff, which he accepted and paid to an innocent indorsee, who had given a valuable consideration for the bill; on discovering the forgery, the plaintiff brought an action for money had and received, to recover back the money; it was held, that the action would not lie; Lord *Mansfield*, C. J., observing, that it was incumbent on the plaintiff to have been satisfied as to the drawer's hand-writing before he accepted the bill (*u*). The defendants took a bill, accepted payable at the plaintiffs', who were the drawee's bankers, and indorsed it to their, the defendants', agents, to whom the plaintiffs paid it when due, and seven days after sent it as their voucher to the drawee, who apprised them that the acceptance was forged. Held by three Justices *Against Chambre, J.*, that the plaintiffs could not recover from the defendants the amount which they had thus paid them on the forged acceptance (*x*). But where the plaintiffs (bankers) discounted for the defendants (bill-brokers) a bill of exchange which the latter did not indorse, and it turned out that the signatures of the drawer and acceptor (the latter of whom kept an account with the plaintiffs) were forged; it was held, that the defendants were liable to refund the money (*y*).

Where a bill of exchange purports to be drawn by a plurality of persons, and is so declared on, the acceptor of such bill will not be permitted to prove that the supposed firm consisted of one person only (*z*). In a declaration by indorsee against acceptor of a bill of exchange stated to be "drawn by certain persons by and under the name, style and firm of G. & Son," and that "the said persons by and under the said name, style and firm of G. & Son" indorsed it: this was held a sufficient description of the drawer and indorser (*a*). Where a bill is drawn in the name of a fictitious person, payable to the order of the drawer, the acceptor is considered as undertaking to pay to the order of the person who signed as drawer; and, therefore, an indorsee may bring evidence to show that the signature of the supposed drawer, to the bill and to the first indorsement, are in the same hand-writing (*b*). Where a bill of exchange, purporting to be drawn by B. & W. (a really existing firm), payable to their order and to be indorsed by them, was negotiated by the acceptor with that indorsement upon it, and the drawing and indorsement were forgeries; it was held, that if the bill was accepted and negotiated by the acceptor with knowledge of the forgery, he was estopped from denying the indorsement as well as the drawing by B. & W. (*c*).

Action by the indorsee against the indorser of a bill of exchange.

(*t*) *Leach v. Buchanan*, 4 Esp. N. P. C. 226.

(*u*) *Price v. Neal*, 3 Burr. 1354; 1 Bl. R. 390, S. C.

(*x*) *Smith v. Mercer*, 6 Taunt. 76.

(*y*) *Fuller v. Smith*, 1 Ry. & Moo. 49.

(*z*) *Bass v. Olive*, 4 M. & S. 13.

(*a*) *Tigar v. Gordon*, 9 M. & W. 347.
See *Ball v. Gordon*, 9 M. & W. 345.

(*b*) *Cooper v. Meyer*, 10 B. & C. 468.

(*c*) *Beeman v. Duck*, 11 M. & W. 251.

The declaration stated several indorsements prior to that of the defendant, which was immediately to the plaintiff. A question arose, whether, upon proof of the defendant's hand-writing, it was necessary to prove the hand-writing of any of the prior indorsers, and particularly that of the original payee. The plaintiff's counsel contended, that the defendant's indorsement admitted all antecedent indorsements; that even if they were forged he would be liable; that he was to be considered as the drawer of a new bill of exchange: and that his contract was very different from that of the acceptor, who only undertook to pay to the payee or his order, and against whom, therefore, a title through the payee must be established. Lord *Ellenborough* was of this opinion, and the plaintiff had a verdict (*d*). Action for money paid by plaintiffs, Messrs. Forsters, Lubbock, & Co., bankers for defendant. A bill of exchange was drawn on defendant by one Hanley, payable to his own order, which defendant accepted, "payable at Forsters, Lubbock, & Co., London," the plaintiffs; when this bill was presented at the plaintiffs' house, it was paid by them, and the action was brought to recover the sum so paid. Plaintiffs proved the acceptance, and the fact of payment, and contended they were entitled to recover without proving the indorsement of the drawer, which was upon the bill at the time it was paid by them; alleging that the bill, when presented, being *prima facie* in a negotiable state, they were authorized to pay it, and were not bound to inquire into the title of the holder; but Lord *Ellenborough* ruled that it was necessary to prove the first indorsement (*e*). In an action against the drawer of a bill, payment of money into court, upon the whole declaration, is an admission of the drawing (*f*).

In order to make the declaration of a prior holder of a bill of exchange evidence, there must be a community of interest between him and the party against whom such evidence is proposed to be given (*g*). In the absence of any community of interest, declarations are not to be received to affect the title or interest of other persons, *merely* because such declarations are against the interest of those who make them. The general rule, that the living witness is to be examined on oath, is not subject to any exception so wide; and the circumstance of fraud being acknowledged does not introduce any difference in principle (*h*).

A receipt upon a negotiable instrument may be contradicted or explained by parol evidence (*i*). Where the plea was, want of consideration for the defendant's acceptance, concluding with a

(*d*) *Critchlow v. Parry*, B. R. 2 Campb. 182. See *Macgregor v. Rhodes*, 25 L. J., Q. B. 319.

(*e*) *Forster v. Clements*, 2 Campb. 17.

(*f*) *Gutteridge v. Smith*, 2 H. Bl. 374.

(*g*) *Barrough v. White*, 4 B. & C. 325.

(*h*) *Per Lord Denman*, C. J., delivering

judgment of court, in *Phillips v. Cole*, 10 A. & E. 111; 2 P. & D. 291.

(*i*) *Scholey v. Walsby*, Peake's N. P. C. 24, recognized by Lord *Tenterden*, delivering judgment in *Graves v. Key*, 3 B. & Ad. 318. See *Phillips v. Warren*, 14 M. & W. 379.

verification, and the plaintiff replied, setting it out, under a *scilicet*, and concluded to the country; it was held, that the plaintiff was not bound to prove the consideration (*k*).

The signature of a party to a bill may be proved by a person who has seen him write his surname only, several times (*l*).

The copy of an original letter, giving notice of the dishonour of a bill, the subject matter of action, and which is produced, is admissible in evidence without notice given to produce the original (*m*); but, *secus*, if the bill is not produced, nor the subject-matter of action (*n*). It is not necessary to give a notice to produce the notice of dishonour (*o*).

In an action against the drawer of a foreign bill, the protest, being part of the custom of merchants with respect to foreign bills, must be proved, if the bill has been drawn for actual value in the hands of the drawee (*p*) but not otherwise (*q*). A promise by the drawer, after the bill is due, that he will pay it, supersedes the necessity of producing the protest; for in such case it will be presumed, from the party's not objecting to the want of a protest at the time when he made the promise, that he has received due notice of dishonour by a protest regularly drawn up by a notary (*r*). The presentment of a foreign bill in England must be proved in the same manner as if it were an inland bill. A notarial protest under seal is not evidence of such presentment (*s*).

A bill of exchange, payable to the order of the drawer, may be given in evidence under the count for money had and received, in an action brought by the drawer and payee against the acceptor (*t*). It seems, that, in an action by payee against acceptor, the bill would not be evidence of an account stated, in a case where the bill was drawn by a third person (*u*).

Recovery of Interest.—On bills of exchange payable at a day certain, and not carrying interest on the face of them, interest is recoverable from the day on which the bills become due. The general rule at the present day, with respect to the allowance of interest, is much narrower than it was formerly. The modern doctrine is, that interest ought to be allowed in those cases only, where there is a contract for payment of money on a certain day, as on bills of exchange and promissory notes; or where there has been an express promise to pay interest; or where, from the course of dealing between the parties, it may be inferred that this was

(*k*) *Low v. Burrowes*, 4 Nev. & M. 367; and see *Batley v. Catterall*, 1 M. & Rob. 379.

(*l*) *Lewis v. Sapio*, M. & Malk. 39.

(*m*) *Kine v. Beaumont*, 3 Brod. & Bingh. 288. By C. B., after conference with B. R.

(*n*) *Lanauze v. Palmer*, M. & Malk. 31.

(*o*) *Swain v. Lewis*, 2 Cr. M. & R. 261.

(*p*) *Gale v. Walsh*, 5 T. R. 239. See

Armani v. Castrique, 13 M. & W. 450.

(*q*) *Legge v. Thorpe*, 12 East, 171; 2 Campb. N. P. C. 310.

(*r*) *Gibbon v. Coggon*, 2 Campb. 188.

(*s*) *Chesmer v. Noyes*, 4 Campb. 129, per Lord Ellenborough, C. J.

(*t*) *Thompson v. Morgan*, 3 Campb. 101.

(*u*) *Early v. Bowman*, 1 B. & Ad. 889.

their intention; or where it can be proved that interest has been actually made of the money (*x*). Hence upon a mere simple contract of money lent, without an agreement for payment of the principal at a certain time, or for interest to run immediately, or under special circumstances, whence a contract for interest may be inferred, interest is not allowable (*y*). In a contract for the sale of goods, although a particular time be limited for payment of the price, yet the vendor is not entitled to interest on the price from that time (*z*). But if at the time of the original contract, the defendant agreed to pay by bill or note, interest is recoverable (as part of the price) from the time when the bill, if given, would have become due, even in an action for goods sold and delivered (*a*), and if there is some evidence for the jury of such an agreement, that is sufficient to support the verdict (*b*). And in such cases interest will be allowed, although the defendant has not accepted the goods, in an action for not accepting the goods (*c*). Bankers cannot charge interest upon interest upon money advanced by them without an express contract for that purpose (*d*). A bill was drawn at Barbadoes on the 8th of February, 1809, on a house in London, payable to the plaintiff at sixty days' sight: the bill was refused acceptance on the 17th of April, 1809, and was afterwards presented for payment on the 19th of June following. Lord *Ellenborough* left the question, from what period the interest was to be calculated, to the special jury, who said that the holder of the bill was entitled to 10l. per cent on the principal, as damages, and that interest was to be allowed only from the time when the bill was presented for payment (*e*); but in a subsequent case, when the holder did not claim any per centage upon the principal as damages, he was allowed interest from the time the bill was dishonoured by non-acceptance (*f*). The drawer of a bill which is dishonoured by the acceptor, is not liable to pay interest for the time which elapses between the day whereon the bill becomes due, and the day when the drawer receives notice of the dishonour (*g*).

By stat. 3 & 4 Will. IV. c. 42, s. 28, "Upon all debts or sums certain, payable at a certain time or otherwise, the jury on the trial of any issue or on any inquisition of damages, may, if they shall think fit (*h*), allow interest to the creditor at a rate not exceeding the current rate of interest from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of

(*x*) *Per* Lord *Ellenborough*, C. J., in *De Haviland v. Bowerbank*, 1 Campb. 50. See *Hare v. Rickards*, 7 Bingh. 254; *Higgins v. Sargent*, 2 B. & C. 349, *Abbot*, C. J.

(*y*) *Calton v. Bragg*, 15 East, 223; *Shaw v. Picton*, 4 B. & C. 723; *Page v. Newman*, 9 B. & C. 378.

(*z*) *Gordon v. Swan*, 2 Campb. 429; 12 East, 419.

(*a*) *Marshall v. Poole*, 13 East, 98, re-

cognized in *Farr v. Ward*, 3 M. & W. 25; *Porter v. Palsgrave*, 2 Campb. 472.

(*b*) *Davis v. Smyth*, 8 M. & W. 399.

(*c*) *Boyce v. Warburton*, 2 Campb. 480.

(*d*) *Darves v. Pinner*, 2 Campb. 486, n.

(*e*) *Gantt v. Mackenzie*, 3 Campb. 51.

(*f*) *Harrison v. Dickson*, *ibid.* 52, n.

(*g*) *Walker v. Barnes*, 5 Taunt. 240.

(*h*) See *Attwood v. Taylor*, 1 M. & Gr. 332; 1 Scott's N. R. 611.

some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment; provided that interest shall be payable in all cases in which it is now payable by law."

Formerly interest was computed from the day on which the principal became due, to the time of commencing the action; but, according to *Robinson v. Bland*, 2 Burr. 1085, interest ought to be carried down to the day on which judgment is signed. And when a defendant, sued upon a security carrying interest, pays money into court sufficient to cover the principal with interest down to the commencement of the action, but not to the time of paying in the money, the plaintiff may proceed; and a jury, on trial, is bound to give him damages for the interest accruing between the commencement of the action and the payment into court (e).

The indorser of a bill or note is liable to pay interest only from the time that he receives notice of dishonour (f). Interest is recoverable from a person who guarantees the due payment of a bill of exchange, if it be not paid when due (g). In an action against the drawer of a bill for 200*l.* with 10*l.* per cent. interest, the holder is entitled to recover interest at 10*l.* per cent. from the time when the bill became due as well as for the time during which it was running (h).

Upon promissory notes payable upon demand, interest is due only from the time of the demand; but upon promissory notes payable at a certain day, interest is due from that day, though there be no demand; because the person who is to pay is in this case bound to find out the other, and pay it at the day (i). On a note payable on demand, where there is no proof of any demand, the plaintiff can only obtain interest from the day of serving the writ of summons (k). Where money due on a balance of accounts is awarded to be paid on a particular day, and at a particular place, if duly demanded there on the day, it carries interest from that day (l). Where the terms of a promissory note are, that it shall be payable by instalments, and on failure of payment of any instalment the whole is to become due, interest becomes payable from the time of the first default (m). A promissory note in this form: "July 20th, 1808. I promise for myself and my executors to pay to F. H., or her executors, one year after my death, 300*l.*, with legal interest," was held to bear interest

(e) *Kidd v. Walker*, 2 B. & Ad. 705.

(f) *Walker v. Barnes*, 5 Taunt. 240.

(g) *Ackerman v. Ehrensperger*, 16 M. & W. 99.

(h) *Keene v. Keene*, 27 L. J., C. P. 88.

(i) *Per Cur. Brockett v. Archer*, M. 6 Geo. I.

(k) *Pierce v. Fothergill*, 2 B. N. C. 167.

(l) *Pinhorn v. Tuckington*, 3 Campb. 468. See *Swinford v. Burn*, Gow's N. P. C. 8.

(m) *Blake v. Lawrence*, 4 Esp. N. P. C. 147, *Ellenborough*, C. J.

from the date of the note (*n*). Under a particular of the plaintiff's demand, stating that the action was brought to recover the amount of a note, interest (although not claimed *eo nomine* in the particular) is recoverable, as arising out of the principal demanded by the particular (*o*).

IX. *Of the Nature of a Promissory Note:*

Stat. 3 & 4 Ann. c. 9, s. 1, placing Promissory Notes on the footing of Inland Bills of Exchange, p. 328.

What are negotiable Notes within the Statute, p. 329.

Of Bankers' Notes, p. 335.

Joint and Several Notes, p. 335.

Consideration, p. 336.

Stamp, p. 337.

A promissory note is an absolute promise in writing to pay to A. or order, or to A. or bearer, a sum of money, either at sight, or at a certain time after sight, or after date, or on demand. It having been held, in the case of *Clerk v. Martin*, Salk. 129, and in other cases, that the *payee*, and in *Buller v. Crips*, 6 Mod. 29, that the *indorsee* of a promissory note, payable to order, could not maintain an action against the maker thereof, such note not being within the custom of merchants; it was for the purpose of encouraging trade and commerce, by permitting promissory notes to be negotiated in like manner as inland bills of exchange, enacted, by stat. 3 & 4 Ann. c. 9, s. 1, "That all notes in writing, made and signed by any person or persons, body politic or corporate, or by the servant or agent of any corporation, banker, goldsmith, merchant or trader (*p*), usually entrusted by them to sign such notes for them, whereby such person, &c., or their servant or agent, promise to pay to any other person or persons, body politic or corporate, or order or bearer, any sum of money mentioned in such note, shall be construed to be, by virtue thereof, due and payable to such person, &c., to whom the same is made payable: and also such note, payable to any person, &c., or order, shall be assignable or indorsable over in the same manner as inland bills of exchange are, or may be, by the custom of merchants; and the person, &c., to whom such sum of money is by such note made payable may maintain an action for the same in *such manner as he might upon an inland bill of exchange*, made according to the custom of merchants; and the person, &c., to whom such note is *indorsed* or assigned, may maintain an action, either against the person, &c., who or whose servant or agent signed such note, or against any of the persons who indorsed the same, *as in cases of inland bills of exchange*, and the plaintiff shall recover damages and costs of suit;

(*n*) *Roffey v. Greenwell*, 10 A. & E. 222.

(*o*) *Blake v. Lawrence*, 4 Esp. N. P. C. 147.

(*p*) The cases enumerated here are instances only. *Per Lord Lyndhurst*, C. B., *Dickenson v. Teague*, 4 Tyrw. 453.

and in case of nonsuit or verdict against plaintiff, defendant shall recover costs."

What are Negotiable Notes.—The foregoing statute being a remedial law, and made for the encouragement of trade and commerce, the courts have construed it liberally: it extends to notes made in a foreign country (*q*). A note promising to *account with* J. S. or order, has been construed as a promise to *pay* J. S. or order, and within the meaning of the statute (*r*). So a promissory note, payable to B. (omitting the words "or order") three months after date, was held a good note within the statute; and it was adjudged, that it might be declared on as such by the payee (*s*). So where the promise was by A. to pay so much to B. for a debt due from C. to B., it was held, that it was within the statute, being an absolute promise, and every way as negotiable as if it had been generally for value received (*t*). So where the note was in this form, "I do acknowledge that Sir A. C. has delivered to me all the bonds and notes, for which 400*l*. were paid to him on account of Col. S., and that Sir A. delivered to me Major G.'s receipt, and bill on me for 10*l*.; which 10*l*. and 15*l*. 5*s*. balance due to Sir A. I am still indebted, and do promise to pay." On demurrer to the declaration, the note was adjudged good (*u*). So where the instrument was, "Received of A. B. 100*l*., which I promise to pay on demand, with lawful interest" (*x*). So where the note set forth in the declaration was, "I do acknowledge myself to be indebted to A. in £ , *to be paid* on demand, for value received." On demurrer to the declaration, the court, after argument, held, that this was a good note within the statute, the words "*to be paid*" amounting to a promise to pay; observing, that the same words in a lease would amount to a covenant to pay rent (*y*). So it was held that the payee could recover upon the following instrument as a promissory note (*z*).

50, King William Street, London Bridge.

March 24th 1860.

Two months after date pay to Mrs. Emma Fielder or order thirty-five pounds value received

ANN LANGSTAFF.

To Mrs. Emma Fielder,
Nelson Lodge, Trafalgar Square, Chelsea.

(*q*) *Milne v. Graham*, 1 B. & C. 192; *De la Chaumette v. Bank of England*, 2 B. & Ad. 385.

(*r*) *Morice v. Lea*, 8 Mod. 362; 1 Str. 629; Lord Raym. 1396, 1397.

(*s*) *Smith v. Kendall*, 6 T. R. 123; *S. P. per Hardwicke*, C. J., Cunningham, Bills of Ex. 127. See also *Moor v. Pain*, Ca. Temp. Hardw. 288, where *Hardwicke*, C. J., said this point had been ruled often.

(*t*) *Poxpewell v. Wilson*, B. R. Str. 264,

on error from C. B. See *Ridout v. Bristol*, 1 Tyrw. 91.

(*u*) *Chadwick v. Allen*, Str. 706. See *Peto v. Reynolds*, 9 Exch. 410; *S. C.* 23 L. J., Exch. 98.

(*x*) *Green v. Davies*, 4 B. & C. 235.

(*y*) *Casborne v. Dutton*, Scacc. M. 1 Geo. II. MS.

(*z*) *Fielder v. Marshall*, 9 C. B. (N. S.) 606.

So the following was held to be a promissory note (a) :—

London Trades Joint Stock Banking Company,
Dorking, Surrey.

24th August, 1839.

Six months after date pay without acceptance to the order of
John Cogan Francis, Esq., 100*l.* value received.

For the Directors,

THOMAS NEWHAM, Manager.

To the London Trades Joint Stock Banking Company,
33, Gracechurch Street, London.

So a promissory note payable by instalments is assignable within the statute, and the maker is entitled to the days of grace upon the falling due of each instalment (b). So where a promissory note was payable by instalments subject to a condition, that on default being made in payment of the first instalment, the whole amount should become immediately payable; it was held, that the note was assignable within the statute, and on default being made by the maker in payment of the first instalment, an indorser was liable for the whole amount (c). So a similar note to the above, except that it was not transferable, was held to be within the statute (d). The following is a good promissory note: "On demand we jointly and severally promise to pay to Messrs. W. S. and M. or to their order, or the major part of them, 1000*l.*" (e). A note payable to the maker's own order is not a promissory note negotiable under the statute; but if a man makes a note payable to his own order, and afterwards indorses it in blank, it thereby becomes a valid note payable to bearer (f); and if such a note be specially indorsed, it becomes a note payable to indorsee or order (g).

This statute, however, extends to such notes only as contain an *absolute* promise to pay money at all events (h) (and not a promise depending upon a contingency), and where the money, at the time of the giving the note, becomes due and payable by virtue thereof (so are the words of the statute), and not where it becomes due and payable by virtue of a subsequent contingency, which perhaps may never happen; in which case the money would never become payable (i). Before the statute of Anne, a promise to pay A. or his assigns a sum of money within a certain time after defendant

(a) *Miller v. Thompson*, 3 M. & Gr. 576.

(b) *Oridge v. Sherborne*, 11 M. & W. 374.

(c) *Carlton v. Kenealy*, 12 M. & W. 139.

(d) *Miller v. Biddle*, 13 L. T., 334.

(e) *Watson v. Evans*, 1 H. & C. 662; 32 L. J., 137 Ex.

(f) *Browne v. De Winton*, 6 C. B. 336;

S. C. 17 L. J., C. P. 281.

(g) *Gay v. Lander*, 6 C. B. 336; 17 L. J., C. P. 286.

(h) *Willes*, C. J., in delivering the opinion of the court in *Coleham v. Cooke*, *Willes*, 398; *Roffey v. Greenwell*, 10 A. & E. 222.

(i) *Robins v. May*, 3 P. & D. 147; 11 A. & E. 213.

should be lawfully married to E. S., was held not to be a good note; because to pay money on such a contingency could not be called trading, and therefore not within the custom of merchants (*k*).

The following notes have been adjudged not to be negotiable notes within the statute, *viz.*:

A promise by defendant to pay to plaintiff 26*l.* within a month after Michaelmas, if the defendant did not pay the 26*l.* for which the plaintiff stood engaged for his brother I. B. (*l*). A promise to pay A. B. £ value received, on the death of C. D. provided he leaves either of us sufficient to pay the said sum, or if we shall be otherwise able to pay it (*m*). A promise to pay A., or B. and C., £ value received (*n*). A promise to pay money within so many days after the maker of the note should marry (*o*). So where the promise was to pay A. F. £ out of the maker's money that should arise from his reversion of £ when sold; the declaration averred the sale of the reversion; yet it was held, that the note could not be declared on as a negotiable note under the statute, because the money was to be paid only on a contingency (*p*). A similar decision was made in *Hill v. Halford* (*q*), where a promise was to pay £ , on the sale or produce, immediately when sold, of the White Hart, St. Albans, Herts, and the goods therein, although it was averred in the declaration, that the house and goods were sold. In a case where the instrument acknowledged to have borrowed and received £ in drafts payable to the defendants at a future day, which the defendants promise to *pay* with interest, it was held that this was a special agreement, and not a promissory note: for the money was not to be paid at all, unless the drafts were honoured (*r*). So where the instrument (*s*) was,—“On demand we promise to pay G. C. or order 1200*l.*, for value received in stock, &c., this being intended to stand against me, the undersigned M. P., as a set-off for that sum left me in my father's will, above my sister Ann's share, signed by T. P. (husband), M. P. (wife).” Where the words were, “September 11, 1839. I undertake to pay to Mr. R. Jarvis, the sum of 6*l.* 4*s.* for a suit of , ordered by Daniel Page. S. W. Wilkins.” The court held that this was not a promissory note; but a guarantee for the sale of goods ordered, that the consideration could be collected by necessary inference, and that no stamp was necessary (*t*). “*Drury v. Vaughan*.—In consideration of W. D. not

(*k*) *Pearson v. Garrett*, 4 Mod. 242.

(*l*) *Appleby v. Biddle*, B. R. H. 3 Geo.

I. MS.

(*m*) *Roberts v. Peake*, 1 Burr. 323.

(*n*) *Blanckenhagen v. Blundell*, 2 B. &

A. 417.

(*o*) *Beardsley v. Baldwin*, Str. 1151; 7 Mod. 417, 8vo. ed.

(*p*) *Carlos v. Fancourt*, 5 T. R. 482.

(*q*) *Hill v. Halford*, 2 B. & P. 413 (in the Exch. Ch.), on error from B. R.

(*r*) *Williamson v. Bennett*, 2 Campb. 417.

(*s*) *Clarke v. Percival*, 2 B. & Ad. 660.

(*t*) *Jarvis v. Wilkins*, 7 M. & W. 411.

taking any further proceedings in the above action, I do hereby undertake with the said W. D. that I will pay him 3*l.* 5*s.* every quarter of a year, from this day until the whole of the principal money now due from J. & T. V. to W. D. 26*l.* 1*s.*, with interest, be fully paid; the first of such quarterly payments to become due on the 30th October next. It is understood that this undertaking is not to be a release or discharge of the note by J. V. and T. V. to the said W. D., but as an additional security for the above-mentioned amount now due on such note, with the interest. Dated, &c." This was held not to be a promissory note, as the money secured by it was not payable at all events (*u*).

Upon an instrument in the common form of a joint and several promissory note, signed by A., B., and C., there was an indorsement (written, as appeared in proof, before B. and C. had signed the note), stating that the note was taken as a security for all balances, not exceeding the sum specified in the note, which A. might owe to the payee; that the note should be in force for six months, and no money liable to be called for sooner in any case: an action having been brought by the payee against B., the first count stating the note as payable on request, and a second as payable six months after date: Lord *Ellenborough*, C. J., held, that although the instrument possibly might have been considered as a promissory note in the hands of a *bond fide* holder, who had received it as such, yet as between the immediate parties it could only be considered as an agreement, for as to them the indorsement must be incorporated with the body of the note (*x*). An instrument, purporting on the face of it to be a promissory note, payable absolutely for the price of goods, but having an indorsement upon it (written before the note was signed), stating that it was given on condition that if any dispute arose about the sale of goods, it would be void, is not a negotiable note (*y*). "Received and borrowed of A. B. 30*l.*, which I promise to pay with interest. I also promise to pay *the demands of the sick club at H.*, in part of interest; and the remaining stock and interest to be paid on demand to the said A. B. Witness my hand, C. D." This was held not to be a promissory note; for the instrument, as far as respected the contingent demand was not a promissory note, and the transaction was entire (*z*).

A promissory note must be for the payment of money only. Hence, on error from C. B. it was held, that a note *to deliver up horses and a wharf*, and pay money at a particular day, could not

(*u*) *Drury v. Macaulay*, 16 M. & W. 146; 16 L. J., Exch. 31. For other instances see *Alexander v. Thomas*, 16 Q. B. 333; 20 L. J., Q. B. 207, and *Storm v. Sterling*, 3 E. & B. 832; 23 L. J., Q. B. 298.

(*x*) *Leeds v. Lancashire*, 2 Campb. 205,

cited by *Littledale*, J., as in point, in *Davies v. Wilkinson*, 10 A. & E. 105; 2 P. & D. 256.

(*y*) *Hartley v. Wilkinson*, 4 M. & S. 25.

(*z*) *Bolton v. Dugdale*, 4 B. & Ad. 619; *Worley v. Harrison*, 3 A. & E. 669, S. P.

be declared on as a note within the statute (a). And a similar determination was made, where the promise was to pay 300*l.* to A. or order, *in good East India Bonds* (b). So where the promise was to pay J. S. so much money, or *to render the body of J. N. to prison before such a day*, the note was held bad: because the note was not necessarily and originally for the payment of money, but by matter *ex post facto* became a note for payment of money only, *viz.* the body not being surrendered to prison (c).

It must not be payable out of a particular fund; which may or may not be productive. Statement of the consideration, however, for which a note was made, will not vitiate it. On this principle, a promissory note to pay a sum of money three months after date, for value received of the premises in Rosemary Lane, late in the possession of T. R., was held (d) a good note within the statute. In the following cases the principle before laid down was recognized, but the notes were adjudged good. A promissory note was given to an infant payable when he should come of age, *viz.* on such a day in such a year; this was holden good; for, *per Denison, J.*, here is no condition or uncertainty, but it is to be paid certainly and at all events, only the time of payment is postponed (e). So where plaintiff declared in the first count on a promissory note dated 27th May, 1732, whereby defendant promised to pay H. D. or order 150 guineas, ten days after the death of his father, John Cooke, for value received, which note, after the death of the father, (which was laid to be the 2nd April, 1741), was duly indorsed by D. to plaintiff; and in the second count, on a promissory note, dated 15th July, 1732, whereby defendant promised to pay H. D., or order, six weeks after the death of his father, fifty guineas, for value received, the like indorsement laid after the death of the father as before: after a general verdict for plaintiff on both notes, it was insisted for defendant, in arrest of judgment, that these notes were not within the statute 3 & 4 Ann. c. 9. After three arguments, *Willes, C. J.*, delivered the opinion of the court in favour of the plaintiff, on the ground that the notes did not depend on any contingency; that there was a certain promise to pay at the time of giving the notes, and the money by virtue thereof would become due and payable one time or other, though it was uncertain when that time would come; that there was not any weight in the objection that the maker might have died before his father, in which case the notes would have been of no value, because the same might be said of any note payable at a distant time; that the maker might die worth nothing before the note became payable. He added, that the court thought that the averment of the death of the father before the indorsement did not make any alteration, because they

(a) *Martin v. Chauntry*, Str. 1271.

(b) *Moor v. Vanlute*, Bull. N. P. 272.

(c) *Smith v. Boheme*, (reported as to the argument,) in Gilb. R. 93, cited in

argument in Lord Raym. 1362, and 1396.

(d) *Burchell v. Slocock*, Lord Raym. 1545, cited by *Kenyon, C. J.*, 6 T. R. 124.

(e) *Goss v. Nelson*, 1 Burr. 226.

were of opinion, that if the notes were not within the statute *ab initio*, they could not be made so by any subsequent contingency (*f*). So where the note was to pay within a certain time after such a ship was paid off; it was held good; because the ship would certainly be paid off one time or other (*g*).

Where an instrument is made in terms so ambiguous as to make it doubtful, whether it be a bill of exchange or a promissory note, the law will allow the holder, at his option, as against the maker of the instrument, to treat it either as a promissory note or as a bill of

(*f*) *Colehan v. Cooke*, Willes, 393; affirmed on error, in Str. 1217.

(*g*) *Andrews v. Franklin*, H. 3 Geo. I. B. R. In Strange's report of this case, 1 Str. p. 24, the opinion of the court is thus given: "The paying off the ship is a thing of a public nature, and this is negotiable as a promissory note." I have stated the case as it was cited by Willes, C. J., delivering the opinion of the court in *Colehan v. Cooke*, Willes, 399. See also Mr. Hume Campbell's argument in *Evans v. Underwood*, 1 Wils. 263, where, in citing this case, he states the opinion of the court to have been that the note was within the statute and negotiable, because the paying off the ship was morally certain. The same point was decided by Hardwicke, C. J., in *Lewis v. Orde*, Middx. Sittings, 8 Geo. II. The note was in this form: "I promise to pay J. S. 11*l*. at the payment of the ship Devonshire, for value received." Willes, C. J., in *Colehan v. Cooke*, Willes, 399, says, "This case was determined on the same reason as *Andrews v. Franklin*, viz. that the ship would certainly be paid off one time or other, which seems to be the true reason;" but in the report of *Lewis v. Orde*, Dict. Trade and Com. 261, copied by Cunningham, p. 127, of Law of Bills and Notes, 2nd ed. 1761, Lord Hardwicke is made to say, "That as to the contingency of the payment, the subsequent act of the payment of the ship makes it certain, and therefore, though not a lien *ab initio*, yet sufficiently so, and within the statute, by the fact happening after;" and in a MS. note, in the possession of the editor, Lord Hardwicke is made to say, "As to the time, this note is certainly within the statute, if it had been made payable at any precise future day; and if it be uncertain at first, but referred to a subsequent fact to make it certain, when that fact happens (as in this case it was averred that the ship Devonshire was paid), it is as much reduced to a certainty as if the day had been mentioned at first. But if the promise is to pay out of any parti-

cular fund, it is not a personal lien, and therefore not within the statute." It may be observed, that this reason clashes with the opinion of the court in *Colehan v. Cooke*, Willes, 399, where it was said, that if the notes were not within the statute *ab initio*, they should not be made so by any subsequent contingency; and with the decision in *Carlos v. Fancourt*, 5 T. R. 482, and in *Hill v. Halford*, 2 Bos. & Pul. 418, in which cases the events on which the notes were to become payable were averred in the declarations to have taken place, and yet the notes were held not to be good. See also *Kingston v. Long*, 4 Doug. 9; where it was held by the court, that if an instrument was not a bill of exchange in its creation, it could never become so afterwards. To the foregoing cases of *Andrews v. Franklin*, and *Lewis v. Orde*, may be added that of *Evans v. Underwood*, 1 Wils. 262, where the note was to pay A. or order, 8*l*. upon the receipt of his the said A.'s wages, due from his Majesty's ship the Suffolk, it being in full for his wages and prize-money, and short-allowance money, for the said ship; the declaration stated an indorsement by A., and averred that the defendant received the said wages from the said ship. After verdict for plaintiff, on motion in arrest of judgment, the case of *Andrews v. Franklin* was mentioned, which Mr. Ford, for the defendant, said had never been determined. The court said, that they would look into the case, and see whether it had been determined. The reporter adds, that the court inclined to give judgment for the plaintiff; and, after looking into the case, did so, *ut audivi*. In *Beardesley v. Baldwin*, E. 15 Geo. II., B. R. MS., the court said, that as to *Andrews v. Franklin*, if it ever was determined, which they could not find, it must have been decided on the certainty observed on the return of ships, and which must be looked upon as an event in itself not contingent. See further on this subject, *Haussoullier v. Hartsinck*, 7 T. R. 733.

exchange (*h*). But where there is an absence of two distinct parties as drawer and drawee, which circumstances are essential to the constitution of a bill of exchange, the instrument is a promissory note, and is properly declared on as such (*i*). A note payable to A. or order, on demand, cannot be re-issued after payment by the maker (*k*).

Of Bankers' Notes.—Bankers' cash notes, or goldsmiths' notes, as they were formerly called, goldsmiths at that time being bankers, are promissory notes given by bankers, payable to order or bearer, on demand, and are stated as such in pleading. They are considered as cash, are transferable by delivery, but may be indorsed; in which case they may be declared on as a bill of exchange against indorser. Cash notes have not been made for a long time except by country bankers; their use having been superseded by the introduction of checks.

Joint and several Notes.—A note beginning, "I promise to pay," and signed by two or more persons, is several as well as joint (*l*). It has been held, that where a promissory note, beginning, "I promise to pay," was signed by one member of a firm for himself and his partners, the party signing was severally liable to be sued upon the note. But this case has been over-ruled, and the law now is, that such a note only binds the firm (*m*). Where a joint and several note is made payable to one of the makers, there is no objection to such maker suing the others (*n*). If a promissory note appears on the face of it to be the separate note of A. only, it cannot be declared on as the joint note of A. and B., although given to secure a debt for which A. and B. were jointly liable (*o*).

In an action by A. against B., upon a promissory note, it was stated in the declaration, that B. and another, jointly *or* severally, promised to pay it. It was held, that the declaration was good; for *or* was synonymous with *and*. They both promised that they or one of them should pay; consequently both and each were liable *in solidum* (*p*). If an action is brought on a joint note, and some of the persons making the note are not made defendants, advantage can be taken of the omission by plea in abatement only (*q*). An action was brought against defendant only, on a joint and several

(*h*) *Edis v. Bury*, 6 B. & C. 433.

(*i*) *Miller v. Thompson*, 3 M. & Gr. 576; 4 Scott's N. R. 204; and see *Peto v. Reynolds*, 4 Exch. 410; 23 L. J., Exch. 98.

(*k*) *Bartrum v. Caddy*, 9 A. & E. 275. See *Beck v. Robley*, 1 H. Bl. 89, n.

(*l*) *March v. Ward*, Peake's N. P. C. 130.

(*m*) *Exp. Buckley*, 14 M. & W. 475;

and see *MacLae v. Sutherland*, 3 E. & B. 1; 25 L. J., Q. B. 229, and *Aggs v. Nicholson*, 24 L. J., Exch. 348.

(*n*) *Beecham v. Smith*, 27 L. J., Q. B. 257.

(*o*) *Siffkin v. Walker*, 2 Campb. 308; *Emly v. Lye*, 15 East, 7.

(*p*) *Rees v. Abbott*, Cowp. 832.

(*q*) *Per Buller, J.*, in *Rees v. Abbott*, Cowp. 832.

note made by defendant and one Stoddart. Defendant gave in evidence an agreement in writing, entered into by plaintiff with the assignees of Stoddart, then a bankrupt, to receive from them 600*l.* in lieu of 833*l.* actually due from the bankrupt on this note (which was for 100*l.*) and on other transactions; and that defendant was only surety for Stoddart. Defendant obtained a verdict. On motion to set it aside, it was resisted on the part of the defendant, on the ground that the agreement put an end to the plaintiff's recovery on the note; that the principal could not be discharged without discharging the surety also. On the part of the plaintiff it was urged, that it was not the meaning of the agreement that defendant should be discharged. But *per* Lord Mansfield, C. J., "the plaintiff was party to the agreement, and we cannot receive parol evidence to explain it. Whatever might be the intention of the parties, the principal cannot be released without its operating for the benefit of the surety." Rule discharged (*r*).

Consideration.—It will be presumed, that the note has been given for a good and valuable consideration until the contrary appear. As between the immediate parties, want or illegality of consideration may be insisted on as a defence. In an action by the payee against the maker of a promissory note for 10*l.* which had been given by the defendant as an apprentice fee with his son to the plaintiff, to whom the son was bound; it appeared, at the trial, that in the indentures of apprenticeship no mention had been made of this premium having been given with the apprentice, nor was there any stamp thereon in proportion to the value, as required by stat. 8 Ann. c. 9, in default of which, by the 39th section of the stat. the indentures are declared to be void. The apprentice remained some part of his time with his master, and then absconded. It was objected, on the part of the defendant, that the indentures being void, the consideration of the note had failed. To this it was answered, that the avoiding of the indentures could not collaterally affect this note: but that at all events it was sufficient, if there were any consideration to sustain it; and here the master had provided board and lodging for some time for the apprentice. But *Lawrence, J.*, was of opinion, that the consideration was entire, and that it had wholly failed. The Court of King's Bench concurred in opinion with the learned judge (*s*). But it is otherwise, if the consideration has not wholly failed (*t*). In an action by payee of a note expressed to be "in consideration of the payee's care and medical attendance bestowed on the maker;" it was held, that evidence was admissible to show the consideration to have been medicines furnished and services performed as an apothecary: and if that was proved, that the plaintiff could not recover, without

(*r*) *Garrett v. Jull*, B. R. M. 22 Geo. III. MS. cited by *Parks, J.*, in *Price v. Edmunds*, 10 B. & C. 582.

(*s*) *Jackson v. Warwick*, 7 T. R. 121.
(*t*) *Mann v. Lent*, 10 B. & C. 877. See also *Obbard v. Betham*, M. & Malk. 483.

showing that he had obtained his certificate under 55 Geo. III. c. 194, s. 21 (*u*). Formerly it was held, that where a note has been given under such circumstances that the payee cannot recover on it, the indorsee must prove that he became so for a valuable consideration (*x*) ; but now the law is, that "unless the note be connected with some fraud, and a suspicion of fraud be raised from its being shown that something has been done with it of an illegal nature, as that it has been clandestinely taken away, or has been lost or stolen (in which cases the holder must show that he gave value for it) the *onus probandi* is cast upon the defendant" (*y*). It is not necessary that the indorsement should be written with ink : it may be with a pencil (*z*). In an action by the indorsee against the maker of a promissory note, the defence insisted on was, that the note had been given for hits against defendant in a lottery insurance ; *Kenyon*, C. J., was of opinion, that the plaintiff was entitled to recover ; and that a contrary determination would shake paper credit to the foundation (*a*). A person who, at the request of the holder of a note, has put his name upon it, and in consequence thereof has been obliged to pay the contents to a *bonâ fide* holder, may recover the money paid from any person whose name is on the note, although he knew that the note was originally given for an illegal consideration, *viz.* for premiums for the insurance of tickets in the lottery (*b*).

Stamp.—Every promissory note must be duly stamped, that is, with a stamp of the proper value and proper denomination. A promissory note given at the time when the 31 Geo. III. c. 25, was the only statute regulating the stamp duty on promissory notes, was held not available in law, because it was stamped with a receipt stamp, although it was of equal value with that required for a promissory note (*c*). For the amount of the stamp duties on promissory notes, see stats. 55 Geo. III. c. 184 ; 16 & 17 Vict. c. 50, 17 & 18 Vict. c. 83, and 23 & 24 Vict. c. 111. A bill was, in fact, drawn on the 21st day of December, for 21*l.*, payable two months after date, but on the face of it purported to bear date on the 31st ; it was held to require only a stamp of 2*s.* which is imposed by 55 Geo. III. c. 184, on bills for that sum, not exceeding two months after date (*d*). The word "date," as there used, means the period of payment expressed on the face of the bill. A promissory note of 40*l.*, payable to bearer generally, and therefore, in law, payable on demand, is within the first class of promissory

(*u*) *Blogg v. Pinkers*, 1 Ry. & M. 125.

(*x*) *Per* three judges, *Heath v. Sansom*, 2 B. & Ad. 297, cited by *Tindal*, C. J., *Bassett v. Dodgin*, 10 Bingh. 43.

(*y*) *Per* Lord Abinger, in *Mills v. Barker*, 1 M. & W. 425.

(*z*) *Geary v. Physic*, 5 B. & C. 234.

(*a*) *Winstanley v. Bowden*, Middlesex

Sittings, after M. T. 41 Geo. III., B. R. MSS.

(*b*) *Seddons v. Stratford*, London Sittings after T. T. 34 Geo. III., *Kenyon*, C. J. ; *Peake's N. P. C.* 215.

(*c*) *Chamberlain v. Porter*, 1 B. & P. N. R. 30.

(*d*) *Upstone v. Marchant*, 2 B. & C. 10.

notes in schedule, part 1, to the 55 Geo. III. c. 184, and requires a 5s. stamp (*e*). A promissory note payable to A. B. generally, is not one payable to bearer on demand, and re-issuable within this first class; but a note payable otherwise than to bearer on demand (not re-issuable), within class 2 (*f*). So a promissory note made for payment of 20*l.* to B. on demand (*g*).

X. Of the Time when a Note ought to be presented for Payment.

Payment must be demanded within a reasonable time after the note becomes due. Whether a note has been presented for payment within a reasonable time is a question of law, but dependent on facts, *viz.* the situation of the parties, their places of abode, and the facility of communication between them (*h*). On promissory notes payable at a certain time after date, or after sight, three days' grace are allowed: consequently, payment of such notes ought not to be demanded until the last of the three days, unless it happen to be a Sunday, or a great holiday, in which case payment ought to be demanded on the next preceding day. The three days of grace are computed exclusively of the day on which the payment is by the terms of the note, to be made. It has not been determined solemnly, whether days of grace are to be allowed on notes payable at sight. They are not allowed on notes payable on demand. A maker of a promissory note payable by instalments, is entitled to the days of grace upon the falling due of each instalment (*i*). Where a note is made payable at a month or months after date, the computation must be (contrary to the general rule of law) by calendar and not by lunar months.

Where a note is in the hands of an indorsee, and he demands payment thereof from the maker, who refuses or omits to pay the same, notice of such refusal or default ought to be given by the indorsee himself, or some other party to the instrument, to the prior indorser or indorsers (if more than one), within a reasonable time; otherwise the indorsers will be discharged (*k*). Action against defendant, as indorser of this note, "One month after date I promise to pay Wm. George, or order, the sum of 16*l.*, for value received. John Hopley." Indorsed, Wm. George. This note George had given in payment to the plaintiff; it became due 2nd May, and on the 5th May the plaintiff's banker (after three days' grace) demanded it of Hopley. Hopley desired two or three days' time

(*e*) *Wells v. Girling*, 8 Taunt. 737.

(*f*) *Cheetham v. Butler*, 5 B. & Ad. 837.

(*g*) *Dixon v. Chambers*, 1 C. M. & R. 845; *Cheetham v. Butler*, 5 B. & Ad. 837; overruling *Keates v. Whieldon*, 8 B. &

C. 7.

(*h*) *Darbishire v. Parker*, 6 East, 3.

(*i*) *Oridge v. Sherborne*, 11 M. & W. 374.

(*k*) See *ante*, "Notice to Indorser."

to pay it in, and so from time to time, which were given him, till the 13th May, when he told the banker he could not pay it. On the 14th, Hopley failed, and became a bankrupt. On plaintiff's applying to George for payment, George told him he should have applied before, on Hopley's first refusal, and that he now did not think himself liable to pay it; whereupon this action was brought. Lord *Mansfield*, C. J.: "The question is, who is to bear the loss, as Hopley, the drawer, has failed? Now it is so necessary for trade, where a bill of exchange is drawn on one man, and made payable to another, that if the person to whom it is payable, either wilfully or through neglect, omits to call at the time it becomes due, it is the constant course of mercantile custom in the city of London, that he shall bear the loss and not the other. This likewise is the rule on indorsed notes, which are in nature of inland bills of exchange; nothing is so certain as this rule, and great inconvenience would follow from a different mode of proceeding. It has been truly said that the law has not fixed any precise time when the neglect of the indorser shall be said to make him liable; but I remember a case determined, where a bill became due at two o'clock on Saturday afternoon, the person who gave the note became a bankrupt at five o'clock on Monday afternoon; the question was, whether the indorsee had not *neglected* to call for his money; and it was held, that he had. The present case is not that of neglect; the note is dated on 2nd April, consequently becomes due on 2nd May, but by the custom of the city there are three days of grace; the banker who has the note in his hands, and who in this case, being the plaintiff's agent, is to be considered as one and the same person with the plaintiff, comes on 5th and demands payment; the indorser and all the parties live in town; the banker gives Hopley indulgence to pay it from 5th to 13th without giving any notice to the indorser, which if he had done, it would have urged the indorser to get his money. Now here is no neglect of application. The case is still stronger: here is an actual credit given for eight days; and the question is, who gave the credit? We cannot go into any consideration of Hopley's circumstances at the time; they might be very bad; and yet if he had been arrested on 5th May, we cannot say he would have paid the money. I am therefore of opinion, that the loss (though this is a hard case) ought to be borne by the person who gave the credit." Verdict for the defendant (l).

Action against the defendant as indorser of a promissory note, due May 4th, 1805. The plaintiff proved the defendant's indorsement, and also, that in the year 1807, the defendant being requested to pay the note, he promised that he would, but prayed for further time. There was no evidence of the presentment of

(l) *Anderson v. George*, London Sitings, after Trin. T. 1757, coram Lord

Mansfield, C. J., MSS. See *ante*, "Non-payment and Notice thereof."

the note to the maker, or of any notice of its non-payment being given to the defendant, nor did it appear that when the defendant so promised to pay, he knew of any application for payment having been made to the maker. For the defendant it was contended, that the subsequent promise did not dispense with proof of the presentment and notice, unless made with full knowledge of the laches of the holder; that in the cases hitherto decided upon this subject, something appeared which might be considered as a waiver of any irregularity, with regard to the bill or note, which could not be inferred from a mere promise to pay, at a time when the party, without being aware of it, was discharged from his liability. But *Bayley, J.*, held, that where a party to a bill or note, knowing it to be due, and knowing that he was entitled to have it presented when due, to the acceptor or maker, and to receive notice of its dishonour, promises to pay it; this is presumptive evidence of the presentment and notice, and he is bound by the promise so made. Verdict for the plaintiff (*m*). But if the drawer or indorser, after being arrested, without acknowledging his liability, merely offers to give a bill by way of compromise for the sum demanded, which offer is rejected, this does not supersede the necessity of notice (*n*). A protest is not necessary in the case of a foreign promissory note (*o*).

XI. *Of the Declaration.*

Pleadings, p. 340.

Evidence, p. 341.

Conclusion, p. 343.

Under the Common Law Procedure Act, concise forms are given, adapted to the different parties, to which the reader is referred.

To action by A., B. and C., against D. (*p*), as one of the indorsers of a promissory note drawn by E., in favour of C., D. (and himself) E., then in partnership, and by them indorsed to A., B. and C.: defendant pleaded in bar, that C., one of the plaintiffs, was liable to an indorser, together with D. On special demurrer, the plea was held to be good; Lord *Eldon*, C. J., observing, that the subject of this plea could not have been pleaded in abatement; because a plea in abatement ought to give a better writ, not to show that the plaintiff could have no action at all. The effect, however, of a judgment for the defendant would be, that if a man made a note to himself and others carrying on business

(*m*) *Taylor v. Jones*, 2 Campb. 105;
and see *Brownell v. Bonney*, 1 Q. B. 39;
4 P. & D. 523.

(*o*) *Bonar v. Mitchell*, 5 Exch. 415;
S. C. 19 L. J., Exch. 302.

(*n*) *Cumming v. French*, 2 Campb. 120.
106, n.

(*p*) *Mainwaring v. Newman*, 2 B. & P.

under a particular firm, and the partnership was dissolved, the promissory note could neither be put in suit as such, nor enforced as an equitable agreement, because on a promissory note stamp. Considering, therefore, the quantity of circulating paper in this country, standing under the same circumstances with the note in question, the consequence of such a decision might be highly injurious. However, the case of *Moffatt v. Van Millengen* (q) was unanswerable.

A note payable on demand is within the Summary Procedure or Bills of Exchange Act, 1855, and the six months for suing runs from the date of the note (r), and so is a banker's cheque (s).

Evidence.—As a general rule, where it is in issue upon the pleadings the original note must be produced in evidence. This rule is dispensed with in special cases only; as where it can be proved, that the note has been lost or destroyed by the defendant (t), or that it is in the hands of the defendant, and *that he has had notice to produce it* (u). In these cases a copy of the note, or parol evidence of its contents, may be received.

The remaining evidence necessary to support the action will vary according to the character in which the parties bring the action, and the nature of the facts put in issue by the pleadings. In an action by *payee* against the maker, the hand-writing of the maker should be proved by some person who is competent to prove such hand-writing, and it is no longer necessary to call the subscribing witness, if there be one (x). An admission under a judge's order, that a bill was accepted by A. for B., is an admission of A.'s authority (y). In an action by *first indorsee* against the maker, the same evidence as in the preceding case, together with proof of the indorsement to the plaintiff, will be necessary if put in issue. In an action against an indorser, proof of the hand-writing of the maker, or of any indorser prior to the defendant (except the first), unless specially alleged in the declaration, is not necessary; but in this case it must be proved that payment was duly demanded of the maker, and that the maker refused to pay, or made default therein, and that notice of such refusal or default was given to the defendant within a reasonable time. In an action against the *maker* of a note, if the promise be to pay the money at a particular place, it is necessary to aver and prove a presentment at that place (z); *secus* if the place of payment be only

(q) 27 Geo. III. B. R. 2 B. & P. 124, n. (e), cited in *Rose v. Poulton*, 2 B. & Ad. 826.

(r) *Maltby v. Murrels*, 5 H. & N. 813; 29 L. J. 377, Ex.

(s) *Eyre v. Waller*, 5 H. & N. 460; 29 L. J., Ex. 246.

(t) Lord Raym. 731.

(u) 2 B. & P. 39.

(x) 17 & 18 Vict. c. 125, s. 26.

(y) *Wilkes v. Hopkins*, 1 C. B. 737.

(z) *Williams v. Waring*, 10 B. & C. 2; *Emblin v. Dartnell*, 12 M. & W. 830; *Spindler v. Grellett*, 1 Ex. 384; 17 L. J., Ex. 6; *Vanderdonckt v. Thellusson*, 8 C. B. 812; 19 L. J., C. P. 13; but see *Nicholls v. Bowes*, 2 Campb. 493.

mentioned in the margin or at the foot of the note (a). If a bill be payable or indorsed specially to a firm, evidence must be given that the firm consists of the persons who sue as plaintiffs; *secus*, if the indorsement be in blank (b). A. being in insolvent circumstances (c), B. undertook to be a security for a debt owing from A. to C., by indorsing a promissory note made by A. payable to B. at the house of D. The note was accordingly so made and indorsed, with the knowledge of all parties. Just before it became due, B. having been informed that D. had no effects of A. in his hands, desired D. to send the note to him, B., and said he would pay it, B. having then a fund in his hands for that purpose; the note was not presented at D.'s house till three days after it was due. It was held, that C. could not maintain an action against B. on the note, not having used due diligence in presenting the note as soon as it was due to D. for payment, and in giving immediate notice to B. of the non-payment by D.; for B. had a right to insist on the strict rule of law respecting the indorser of a note, notwithstanding the particular circumstances of the case. In an action by a second, third, or any subsequent indorsee, against the maker, where the first indorsement is in blank; as the plaintiff is not bound to set forth any indorsement, except the first, but may strike out the others, if he adopts this course, the proof will be the same as in the preceding case; but if all or any of the indorsements subsequent to the first are set forth, they must be proved if put in issue. Indorsements of interest are to be presumed to have been written at the time they bear date, until contradicted (d). The defendant may, if he has so pleaded it, show either that there was no consideration for the note, or that the consideration has failed (e). The defendant cannot set up in defence a parol agreement, entered into when the note was made, that it should be renewed when it became due (f); nor a parol agreement that payment shall not be demanded until after such a time (g); for this would be incorporating with a written contract an incongruous parol condition, which is contrary to first principles. Where a promissory note, on the face of it, purported to be payable on demand, parol evidence is not admissible to show that, at the time of making it, it was agreed that it should not be payable until after the decease of the maker (h). Where in an action by the indorsee against the maker of a promissory note, payable with interest on demand, the plaintiff having proved that he gave value

(a) *Price v. Mitchell*, 4 Campb. 200; *Masters v. Barretts*, 8 C. B. 433; 19 L. J., Ex. 50.

(b) *Ord v. Portal*, 3 Campb. 239.

(c) *Nicholson v. Gouthit*, 2 H. Bl. 609.

(d) *Smith v. Battens*, 1 M. & Rob. 341.

(e) *Per Tindal, C. J., Abbott v. Hendricks*, 1 M. & Gr. 794; 2 Scott's N. R.

183; recognizing *Foster v. Jolly*, 1 Cr. M. & R. 703.

(f) *Hoare v. Graham*, 3 Campb. 57.

(g) *Free v. Hawkins*, 8 Taunt. 92; *Mosley v. Handford*, 10 B. & C. 729; *Foster v. Jolly*, 1 Cr. M. & R. 703; *Besant v. Cross*, 10 C. B. 895.

(h) *Woodbridge v. Spooner*, 3 B. & A. 233.

for it, the defendant tendered evidence of declarations made by the payee, when the note was in his possession, that he (the payee) had not given any consideration for it to the maker; it was held, that the evidence was inadmissible, as the payee could not be identified with the plaintiff, and the note could not be treated as over due at the time of the indorsement (*i*). So where, in an action by indorsee of A. of a note, against maker, plea, that the note was made without consideration, and indorsed and delivered by A. to W., for the purpose only of its being discounted; that W., in fraud of the maker (defendant) and without his consent, indorsed the same and delivered it to plaintiff, who gave no consideration, and who knew of the want of authority; it was held, that evidence tendered by defendant of declarations made by W. to prove the fraud was not admissible; inasmuch as there was not shown any community of interest, neither was any evidence offered which, either directly or indirectly, connected the plaintiff with W., or to show want of consideration, or that the note had been taken when over due (*k*).

On a plea that the defendant did not make the promissory note mentioned in the declaration, he cannot give in evidence that he was of imbecile mind at the time when he made it (*l*).

Conclusion.—The limits prescribed to this Abridgment will not permit the insertion of any more cases under this head, nor indeed is it necessary; for although a promissory note (*m*), while it continues in its original shape, does not bear any resemblance to a bill of exchange, yet when it is indorsed the resemblance begins; for then it is an order by the indorser upon the maker of the note to pay to the indorsee: the indorser is as it were the drawer, the maker of the note the acceptor; and the indorsee the payee. From this resemblance between a bill of exchange and promissory note, it follows that many of the rules which are applicable to bills of exchange, hold also in the case of promissory notes (*n*). But the indorser does not stand in the situation of maker, relatively to his indorsee. Hence the indorsee cannot declare against his indorser as maker, even where the indorser has indorsed a note not payable or indorsed to him, and where consequently his indorsee cannot sue the original maker (*o*).

(*i*) *Barrough v. White*, 4 B. & C. 325.

(*k*) *Phillips v. Cole*, 10 A. & E. 106.

(*l*) *Harrison v. Richardson*, 1 M. & Rob. 504, *Abinger, C. B.*

(*m*) *Per Lord Mansfield, C. J., Heylyn v. Adamson*, 2 Burr. 676.

(*n*) See *De Berdt v. Atkinson*, 2 H. Bl. 336; and *ante*, p. 383.

(*o*) *Gwinnett v. Herbert*, 5 A. & E. 436. See *Burmester v. Hogarth*, 11 M. & W. 97.

CHAPTER X.

CARRIERS.

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I. *Of Common Carriers, and their Responsibility.*

MASTERS (a) and owners of ships, hoymen, wharfingers (b), lightermen, barge-owners (c), proprietors of waggons, stage-coaches, railway companies (d), &c., are denominated common carriers; and by the custom of the realm (e), that is, by the common law, are bound to receive (unless they have reasonable excuse) (f) and carry the goods of the subject, of the sort which they profess to carry or are in the habit of carrying (g), for a reasonable hire or reward (h), to take due care of them in their passage, and to deliver them (i)

(a) *Morse v. Slue*, 2 Lev. 69.

(b) *Maving v. Todd*, 1 Starkie's N. P. C. 72.

(c) *Rich v. Kneeland*, Cro. Jac. 330; Hob. 17.

(d) But a railway company are only carriers of goods which they profess to carry or actually carry. *Palmer v. Grand Junction Railway*, 4 M. & W. 749; *Johnson v. Midland Railway*, 4 Exch. 367; *Slim v. Great Northern Railway*, 14 C. B. 647; S. C. 23 L. J., C. P. 166; *Crouch v. London and North Western Railway*, 14 C. B. 255; 23 L. J., C. P. 73. In the latter case it was held that a common carrier from a place within to a place without the realm, is subject to the

same liabilities at common law as a common carrier who carries only within the realm. As to carriers by railways and canals, see now 17 & 18 Vict. c. 31, *post*.
(e) 1 Roll. Abr. 2. (C.) pl. 1.

(f) *Jackson v. Rogers*, 2 Show. 327; *Wyld v. Pickford*, 8 M. & W. 443; *Crouch v. London and North Western Railway*, 14 C. B. 255; 23 L. J., C. P. 73.

(g) *Garton v. Bristol and Exeter Railway*, 1 B. & S. 112; *Johnson v. Midland Railway*, 6 Ry. Cases, 64; *Oxlade v. North Eastern Railway*, 15 C. B. (N. S.) 680; 4 Ex. 365.

(h) *Bastard v. Bastard*, 2 Show. 81.

(i) *Per Popham*, C. J., *Owen*, 57.

safely, and within a reasonable time (*j*), and in the same condition as when they were received; or in default thereof to make compensation to the owner for any loss or damage which happens while the goods are in their custody, except such loss or damage as arises from the act of God (*k*), as storms, tempests, and the like; or from the acts of the enemies of the King. If the consignee refuse to accept the goods the carrier is not bound to inform the consignor of the fact; but he is merely bound to do what is reasonable under the particular circumstances of each case, which is a question for the jury (*l*). Where the consignee of a parcel refused to pay the amount charged by a carrier for the conveyance of a parcel as being excessive, and the carrier immediately sent it back from Plymouth, its place of destination, to London, whence it had been sent, and the consignee afterwards, but within a reasonable time after it had been tendered for delivery, offered to pay the sum charged, but the carrier refused to receive the same or to deliver the parcel; it was held, that such conduct was unreasonable on the part of the carrier, and that he was liable for the value of the parcel (*m*).

The hire must be a reasonable sum, but a carrier was not bound at common law to charge the same to all customers, although it might be evidence to show that the higher charge was unreasonable: he has no right to refuse to carry a parcel without being informed of its contents (*n*).

Carriers are, generally, answerable for the honesty of their servants: if, however, the plaintiff's own conduct, in full knowledge of the circumstances, be such as to lead to the loss; if he afford undue temptation and facility to the crime of the servant, he can maintain no action for a loss thus occasioned by his own fault (*o*).

In an action brought against a common carrier by water, charging the defendant with negligence; it was held to be no defence that the ship was tight when the goods were placed on board, but that a rat, by gnawing out the oakum, had made a small hole through which the water gushed; on the ground, that whatever was not excused by law, was to be deemed a negligence

(*j*) Story on Bailment, 545 a.; *Bridgton v. Great Northern Railway Company*, 28 L. J., Ex. 51. In *Hyde v. The Trent and Mersey Navigation Company*, 5 T. R. 396, the general question, whether a carrier was bound to deliver the goods to the person to whom they were directed, was agitated; *Ashhurst, Buller, and Grose, Js.*, were of opinion that a carrier was so bound; but *Kenyon, C. J.*, appears to have inclined to the contrary opinion. The special circumstances of the case (which see, *post*) rendered it unnecessary for the court to decide the general question.

(*k*) *Amies v. Stevens*, Str. 128; and see *Oakley v. Port of Portsmouth Steam Packet Company*, 25 L. J., Exch. 99; 11 Exch. 618.

(*l*) *Hudson v. Baxendale*, 27 L. J. Exch. 93.

(*m*) *Crouch v. Great Western Railway*, 27 L. J., Exch. 345.

(*n*) *Crouch v. London and North Western Railway*, 14 C. B. 255; and see *Finnie v. Glasgow and S. W. Railway*, 2 Macq. H. L. Cas. 177.

(*o*) *Bradley v. Waterhouse, M. & Malk.* 154.

in the carrier, and that he was answerable in all events, except where the goods were damaged by the act of God or the king's enemies (*p*). So where the proprietors of the Trent navigation had undertaken to carry goods from Hull to Gainsborough, and the vessel, on board which the goods were placed, drove against an anchor in the River Humber and sank; it was held, that the carriers were responsible to the owner of the goods for the damage sustained; although it was proved that the accident was occasioned by the negligence of the persons on board a barge in the river, who had not put a buoy out, to mark the place where the anchor lay: the court observing that there was a degree of negligence in the master of the vessel also; for his not seeing the buoy ought to have put him upon inquiring more minutely about the anchor; and even if there had not been any actual negligence, yet negligence in law was sufficient (*q*).

A common carrier being an insurer, in all cases (except the two before mentioned), is responsible for a loss occasioned by accidental fire, provided such loss happens while the goods are remaining in his custody *as a common carrier*. As where the goods intrusted to a common carrier were consumed by accidental fire communicating to a booth where the goods had been deposited by the carrier in the course of the journey; it was held, that the carrier was liable, although the jury found that the goods were consumed without any actual negligence on the part of the carrier (*r*). So where common carriers from A. to B. charged and received for cartage of goods from a warehouse at B. (where they usually unloaded, but which did not belong to them), to the house of the consignee, in B.; it was held, they were responsible for a loss by an accidental fire while the goods were in that warehouse; although they allowed the profits of the cartage to another person, and that circumstance was known to the consignee (*s*). So where to a declaration on a contract by the master of a steam vessel to convey goods from Dublin to London, and to deliver the same at the port of London to plaintiff or his assigns, the defendant pleaded that, after the arrival of the vessel at London defendant caused the goods to be deposited on a wharf, there to remain until they could be delivered to the plaintiff, the wharf being a place where goods from Dublin were accustomed to be landed, and fit and proper for such purposes, and that before a reasonable time for delivery elapsed they were destroyed by an accidental fire, the plea was held ill; the court considering, that the defendant was acting, during the whole of the time whilst the goods were in his possession, under the obligation of a common carrier, who is liable for every loss (not specially excepted), except

(*p*) *Dale v. Hall*, 1 Wils. 281.

(*q*) *Proprietors of the Trent Navigation v. Wood*, 3 Esp. N. B. C. 127.

(*r*) *Forward v. Pittard*, 1 T. R. 27.

(*s*) *Hyde v. Trent and Mersey Navigation*, 5 T. R. 389; and see *Bourne v. Gatcliffe*, 3 M. & G. 643; 7 M. & G. 850; 11 C. & F. 45.

the act of God and the king's enemies (*t*). But where the goods are not remaining in the defendant's custody as common carrier, he is not liable; as where the goods had been carried by the defendant from A. to B. and there deposited in his warehouse, merely for the convenience of the owner, until they could be forwarded by another conveyance (the owner not paying the defendant anything for the warehouse-room), and were consumed by an accidental fire there, it was held, that the defendant was not liable (*u*). In *Cairns v. Robins*, 8 M. & W. 258, Lord Abinger, C. B., said, "A distinction has been properly drawn between the duties of a carrier and of a warehouseman. But the party may have so large a compensation as a carrier, as to be sufficient also to remunerate him for acting as a warehouseman, as is the case with many of the canal companies; and it is quite consistent with both these characters, that he will for a certain time, until further orders, or for a reasonable time, keep the goods, considering the general remuneration for carrying sufficient to cover this risk also (*x*). Where parcels are deposited in a cloak room at a railway station, the company does not receive them as a carrier, but the responsibility of the company depends upon the terms of the contract of bailment, *i. e.* practically the company's liability is limited by the printed regulations upon the ticket given to the depositor (*y*).

If a person brings a parcel to a railway station (which in this respect is just the same as a coach-office), although he knows at the time that the railway company only carry to a particular place, yet if the company receive and book it to another place to which it is directed, *prima facie* they undertake to carry it to that place. A parcel was delivered at Lancaster, to the Lancaster and Preston Railway Company, directed to a person at Bartlow, in Derbyshire; and the person who brought it to the station offered to pay the carriage, but the bookkeeper said it had better be paid by the person to whom it was directed, on the receipt of it. The company were known to be proprietors of the line only as far as Preston, where the railway unites with the North Union, and that afterwards with another, and so on into Derbyshire. The parcel having been lost after it was forwarded from Preston, it was held, that the Lancaster and Preston Railway Company were liable for its loss (*z*). And if the sender of the goods countermand the directions originally given, and the goods are lost by reason of the railway company's non-compliance with the countermand, they are liable for such loss (*a*).

(*t*) *Bourne v. Gatliffe*, 11 C. & F. 45.

(*u*) *Garside v. Trent and Mersey Navigation*, 4 T. R. 581; and see *Bourne v. Gatliffe*, 11 C. & F. 45.

(*x*) See also *Giles v. Taff Vale Railway*, 2 E. & B. 822.

(*y*) *Van Toll v. South Eastern Railway*, 31 L. J., C. P. 241.

(*z*) *Muschamp v. Lancaster and Pres-*

ton Junction Railway, 8 M. & W. 421; and see *Collins v. Bristol and Exeter Railway*, 26 L. J., Exch. 103; and *Wilby v. West Cornwall Railway*, 27 L. J., Exch. 181.

(*a*) *Scotthorne v. South Staffordshire Railway*, 8 Exch. 341; 22 L. J., Exch. 191.

If a common carrier be robbed of his goods, he shall answer the value of them ; for *having his hire*, there is an implied undertaking for the safe custody and delivery (b).

Where a person undertakes to carry goods safely and securely, he will be responsible for the damage they sustain in the carriage through his neglect, though he is not a common carrier, nor has any reward for his labour (c) ; and this rule holds, although the plaintiff, for greater caution, sends his servant with the goods, who pays a person for guarding them, because he apprehends danger of their being stolen (d).

A stage coachman has been held responsible for the loss of a parcel which he had received to carry without reward, it appearing to have been lost through gross negligence on his part (e). In a special action on the case, wherein the plaintiff declared that whereas the defendant had undertaken to carry a hare for the plaintiff from A. to B., yet the defendant carried the same so negligently, that he lost it by the way, on demurrer, it was objected by *Hawkins*, Serjeant, that the plaintiff had not declared, on the general custom of the realm relating to carriers, and, therefore, the defendant must be taken to be a private person ; if so, there was not any consideration laid, and consequently the promise was merely *nudum pactum*. 2ndly. The plaintiff had not set forth a delivery of the hare, upon which the promise was made, and for the breach of which promise the action was brought. *Probyn* and *Reynolds*, (the only judges in court,) as to the first objection, admitted that the defendant must be taken to be a private person ; but it was determined in *Coggs v. Bernard*, that a private person was answerable, if he undertook the carriage of goods, for a misfeasance, though there was not any consideration ; and the only difference was, that a common carrier was obliged to undertake the carriage of goods, and a private person was not ; but if a private person voluntarily undertook it, he was by law answerable for damage arising from his negligence. As to the second objection, the court said, that the delivery was implied ; for it was stated, that the defendant had carried the hare part of the way, which he could not have done without a delivery ; and as for the breach of promise, the action was not brought for that, but for the loss of the hare ; the promise was only inducement. Accordingly they gave judgment for the plaintiff (f).

Carrier of Passengers.—Carriers of passengers for hire are sub-

(b) 1 Inst. 89, a ; *Woodliffe v. Curties*, 1 Roll. Ab. 2, (C) pl. 4 ; *S. P. Covington v. Willan*, Gow's N. P. C. 115.

(c) *Coggs v. Bernard*, Lord Raym. 909 ; 1 Smith's Lead. Cas.

(d) *Robinson v. Dunmore*, 2 B. & P. 416.

(e) *Beauchamp v. Powley*, 1 M. & Rob.

38 ; *Ross v. Hill*, 2 C. B. 877 ; 15 L. J., C. P. 182 ; *Powles v. Hilder*, 25 L. J., Q. B., 331, in which latter case it was decided that the owner of a hack cab was liable for a loss occasioned by the driver.

(f) *Hutton v. Osborne*, B. R. M. Geo. II. MS.

ject at common law to the same responsibility as carriers of goods, so far as regards the passengers' luggage (*g*), but this must be ordinary luggage, articles of personal convenience and use, and not merchandise or valuables, although carried in a trunk (*h*), unless the carrier has received the luggage, knowing that it is goods or merchandise (*i*). The fact that the luggage is carried in the same carriage with the passenger will not relieve the carrier from his liability (*k*).

"There is nothing more common than for persons to put part of their luggage into the same railway carriage with them: and that may be done under such circumstances as never to cast any responsibility on the carriers: but that is to be proved. When this is done by the company's servants, the company are not relieved from their liability as carriers in respect of it. So a passenger taking a valuable article openly and notoriously into the same carriage in which he travels, will not save the company from responsibility" (*l*). A railway company are bound, on the arrival of the train at the terminus of the journey, to deliver a passenger's luggage into a carriage to be conveyed from their station, if required so to do, and if such is their usual practice (*m*).

Carriers of passengers are not common carriers (*n*), *i. e.* they are not as regards their duties in respect to the passengers themselves under the same liabilities at common law as carriers of goods; they are not insurers, they are not responsible for mere accidents happening to the persons of passengers without any default on the carriers' part (*o*), but they are bound to carry passengers upon their tendering their fare, provided they have no reasonable excuse (*p*), having received them they are bound to provide for their safety and conveyance so far as human care and foresight can go (*q*), and to use due care and diligence to carry them without delay; and of course they are liable for the negligence of their servants in the course of their employment (*r*). It has only recently been decided in the Queen's Bench that they do not absolutely warrant that the conveyance is sufficiently secure to undertake a journey (*s*), and

(*g*) *Brooke v. Pickwick*, 4 Bing. 218; *Richard v. Great Northern Railway*, 7 C. B. 839. See, however, remarks of Pollock, C. B. *Stewart v. London and North Western Railway*, 33 L. J., Ex. 199.

(*h*) *Great Northern Railway v. Shepherd*, 8 Exch. 30; *Belfast Railway v. Keys*, 9 H. of L. Cas. 556; *Phelps v. London and North Western Railway*, 19 C. B. (N. S.) 321.

(*i*) *Ibid.*

(*k*) *Le Conteur v. London and South Western Railway*, 35 L. J., Q. B. 40.

(*l*) *Per Wilde*, C. J., in *Richards v. London and South Coast Railway*, 18 L. J., C. P. 254; 7 C. B. 839; *Le Conteur*

v. London and South Western Railway Company, 6 B. & S. 961.

(*m*) *Butcher v. London and South Western Railway*, 16 C. B. 13; 24 L. J., C. P. 137.

(*n*) Bac. Ab. Carrier, A.

(*o*) *Aston v. Hearen*, 2 Esp. 533.

(*p*) Story on Bailment, and authorities cited by him, s. 496.

(*q*) *Per Mansfield*, C. J. in *Christie v. Griggs*, 2 Campb. 79.

(*r*) See duty of coach-owners explained by *Best*, C. J., in *Crofts v. Waterhouse*, 3 Bing. 321.

(*s*) *Redhead v. Midland Railway*, 2 L. R., Q. B. 413; *Sharp v. Grey*, 9 Bing. 257; 2 M. & S. 620.

Blackburn, J., dissented from the judgment of the Court, *Mellor and Lush, JJ.* An action has been held to lie against a railway company for refusing to convey a passenger by a train advertised in their time tables (*t*).

A., a stable-keeper, let to B. four horses to draw B.'s carriage from C. to D. The horses were ridden by A.'s servants. Through their negligence, the carriage of I. S. sustained an injury. It was held, that I. S. might maintain an action against A. (*u*).

The liability of railway companies as to the conveyance of passengers stands simply on the common law, capable of being modified by special conditions that may be stipulated for on a special contract, for the Canal and Railway Traffic Act and the Carriers Act do not, with one trifling exception, apply to passenger traffic. The contract as to the time at which a passenger is to be delivered is contained in the time table (*y*). Where the Great Northern published and circulated a time table, stating that a certain train would run from P. to H., although they knew the train would only run to M., an intermediate station, and the plaintiff was detained and sustained damage in consequence thereof, it was held, that he might recover on the ground that the circulation of the time bills amounted to a fraudulent representation; the majority of the court also held, that the time table amounted to a contract on behalf of the company with those who should come to the station to forward them as stated in the table (*x*). But where there is a statement on a time table, stating that the company will not be liable for the punctual arrival of a train, but will do their best to ensure its punctuality, it would seem that a person has no remedy for damage sustained from detention on the journey (*y*), unless at any rate he can show negligence in not taking due care to ensure the due arrival of the train. The right which a passenger by railway has to be carried safely does not depend on his having made a contract, but the fact of his being a passenger, with the company's authority, casts a duty on them to carry him safely (*z*).

It is a *prima facie* case of negligence in a railway company, that at the time an accident, not consistent with due care, occurred, the train and railway were exclusively in their management (*a*). But this *prima facie* case may be rebutted by showing that the accident

(*t*) *Denton v. Great Northern Railway*, *supra*; and see *Bennett v. Peninsular and Oriental Company*, 6 C. B. 775. As to the damages recoverable in such action, see *Hamlin v. Great Northern Railway*, 1 H. & N. 408; 26 L. J., Exch. 20, *post*, 368.

(*u*) *Sammell v. Wright*, 5 Esp. N. P. C. 268. See *Quarman v. Burnett*, 6 M. & W. 499; *post*, tit. "Master and Servant."

(*x*) *Denton v. Great Northern Railway*, 5 E. & B. 860.

(*y*) *Hurst v. Great Western Railway*, 19 C. B. 311; 34 L. J., C. P. 264. See *Bridson v. Great Northern Railway*, 28 L. J., Ex. 51.

(*z*) *Marshall v. Newcastle and Berwick Railway*, 11 C. B. 655; 21 L. J., C. P. 34; *Austin v. Great Western Railway*, 2 L. R., Q. B. 445.

(*a*) *Carpue v. The London and Brighton Railway*, 5 Q. B. 747; *Skinner v. South Coast Railway*, 5 Exch. 787. See *Scott v. London Docks*, 3 H. & C. 599.

was occasioned by the wilful act of a stranger (b). "Though there may have been negligence on the part of the plaintiff, yet, unless he might by the exercise of ordinary care have avoided the consequences of the defendant's negligence, he is entitled to recover: if by ordinary care he could have avoided them, he is the author of his own wrong" (c). But in order to sustain an action for damages arising from such negligence, the plaintiff must not have been in the railway carriage under such circumstances as to have been a trespasser (d). If the injury might have been avoided by the reasonable skill of those who had the management of the conveyance in which the plaintiff was a passenger, he has no remedy against the owner of the other conveyance through whose negligence the accident was caused (e), although if the accident was in part only occasioned by want of care on the part of the conductor of the conveyance in which the plaintiff was, that would not be a defence to such an action (f).

II. *Of the Stat. 11 Geo. IV. & 1 Will. IV. c. 68, limiting the Responsibility of Carriers by Land (g) as to the Loss of Parcels of a certain Description; and the Canal and Railway Company Traffic Act (17 & 18 Vict. c. 31).*

The 11 Geo. IV. & 1 Will. IV. c. 68, usually cited as the Carriers Act, is intituled "An Act for the more effectual Protection of Mail Contractors, Stage Coach Proprietors, and other common Carriers for Hire, against the Loss or Injury to Parcels or Packages delivered to them for Conveyance or Custody, the Value and Contents of which shall not be declared to them by the Owners thereof." The preamble recites, "That by reason of the frequent practice of bankers and others sending by the public mails, stage-coaches, waggons, vans, and other public conveyances by land, for hire, parcels and packages containing money, bills, notes, jewellery, and other articles of great value in small compass, much valuable property is rendered liable to depredation, and the responsibility of mail contractors, stage-coach proprietors, and common carriers for hire, is greatly increased; and through the frequent omission by persons sending such parcels and packages to notify the value and nature of the contents thereof, so as to enable such mail contractors, &c., by due diligence to protect themselves against losses arising from their legal responsibility,

(b) *Latch v. The Rummer Railway*, 27 L. J., Exch. 155. See *Bird v. Great Northern Railway*, 28 L. J. Exch. 3.

(c) *Per Parke, B.*, in *Bridge v. Grand Junction Railway*, 3 M. & W. 248. See also *Greenland v. Chaplin*, 5 Exch. 243, and *Martin v. Great Northern Railway*, 16 C. B. 179.

(d) See *Great Northern Railway v.*

Harrison (in error), 10 Exch. 376; 23 L. J., Exch. 308; and *Lygo v. Newbold*, 9 Exch. 302.

(e) *Thorogood v. Bryan*, 8 C. B. 115; 18 L. J., C. P. 336.

(f) *Rigby v. Hewett*, 5 Exch. 240; 19 L. J., Exch. 291.

(g) As to the limit of the liability of carriers by sea, see article *Shipping*.

and the difficulty of fixing parties with knowledge of notices published by such mail contractors, &c., with the intent to limit such responsibility, they have become exposed to great and unavoidable risks, and have thereby sustained heavy losses ;” it is then enacted, “that no mail contractor, stage-coach proprietor, or other common carrier *by land*, for hire, shall be liable for the loss of, or injury to, any article of property of the descriptions following ; (that is to say), gold or silver coin of this realm or of any foreign state, or any gold or silver in a manufactured or unmanufactured state, or any precious stones, jewellery, watches, clocks, or timepieces of any description, trinkets, bills, notes of the governor and company of the Banks of England, Scotland, and Ireland respectively, or of any other bank in Great Britain or Ireland, orders, notes, or securities for payment of money, English or foreign, stamps, maps, writings, title-deeds, paintings, engravings, pictures, gold or silver plate, or plated articles, glass, china, silks in a manufactured or unmanufactured state, and whether wrought up or not wrought up with other materials (*h*), furs (*i*) or lace, or any of them, contained in any parcel or package which shall have been delivered, either to be carried for hire, or to accompany the person of any passenger in any mail or stage-coach, or other public conveyance, when the value of such article or articles, or property aforesaid contained in such parcel or package shall exceed the sum of ten pounds, unless at the time of the delivery thereof at the office, warehouse, or receiving-house of such mail-contractor, &c., or to their book-keeper, coachman, or other servant, for the purpose of being carried, or of accompanying the person of any passenger as aforesaid, the value and nature of such article or articles, or property shall have been declared by the persons sending or delivering the same, and such increased charge as hereinafter mentioned, or an engagement to pay the same, be accepted by the person receiving such parcel or package” (*k*). [By 28 & 29 Vict. c. 94, s. 1, lace is not to include machine-made lace.] By the second section, common carriers, upon delivery of such parcels exceeding the value of ten pounds, and so declared as aforesaid, may demand an increased rate of charge, which is to be notified by a notice in legible characters affixed in the office ; and persons sending parcels are to be bound by such notice, without further proof of the same having come to their knowledge. The third section directs that carriers shall, if required, give a receipt for the parcel, acknowledging the same to have been insured, which receipt shall not be liable to any stamp duty ; and carriers who do not give such receipt, when required, or affix the proper notice, “shall not be entitled to any benefit or advantage under the act, but shall be liable as at the common law, and shall also be liable to refund the

(*h*) *Darcy v. Mason*, 1 Car. & M. 45.

(*i*) *Mayhew v. Nelson*, 6 C. & P. 58.

(*k*) For a plea setting up by way of

defence the non-declaration of the nature and value of the goods, see *Pianciani v. South Western Railway*, 18 C. B. 226.

increased rate of charge" (l). By the fourth section, carriers cannot by a *public notice* or declaration limit their liability at common law to answer for the loss of any articles in respect whereof they are not entitled to the benefit of this act. By the fifth section, every office of such common carrier shall be deemed a receiving-house (m), and any one proprietor shall be liable to be sued, and no action shall abate for want of joining any co-proprietor. Special contracts are not affected by this act (n). Parties entitled to damages for parcels lost or damaged may recover the extra charges for insurance (o). This act does not protect any such common carrier from liability to answer for loss or injury arising from the felonious act of any servant in his employ, nor does it protect any such servant from liability for any loss or injury occasioned by his own personal neglect or misconduct (p). Where felony on the part of such servant is set up in answer to a defence under the statute, the question of negligence becomes immaterial, but a mere suspicion that the loss arose from felony by the carrier's servants is not sufficient; it must be proved that it actually did so arise (q). Carriers are not to be concluded as to the value of any parcel by the value declared, but the party injured must prove the actual value by the ordinary legal evidence (r). Money may be paid into court by the common carrier in the same manner and with the same effect as money paid into court in any other action (s).

Although the foregoing statute in the preamble mentions articles of great value in small compass, yet the provisions of sect. 1, in its enacting part, are not controlled by those words in the preamble. The terms of that section are general, and it applies to any glass article if exceeding ten pounds in value. The carriage of glass requires particular attention, and imposes peculiar risk on the carrier. The term "glass" in the act being unlimited, the court would not be justified in saying that it applied to small glasses only, and not to glass of every description. In such a case, therefore, the plaintiff cannot recover, if he does not comply with the terms of the notice in the office, unless he can establish wrongful conduct, so as to take the case out of the protection intended by the statute (t). The protection, however, does not extend to a case where damage has arisen to the owner from delay in the delivery of the goods (u). And in a recent case it has been held,

(l) See *Hart v. Bazendale*, 7 Exch. 769.

(m) *Syms v. Chaplin*, 5 A. & E. 634; 1 Nev. & P. 129.

(n) Sect. 6.

(o) Sect. 7.

(p) Sect. 8.

(q) See *Great Western Railway v. Remell*, 18 C. B. 575; 27 L. J., C. P. 201, where *Butt v. Great Western*

Railway, 11 C. B. 140, is explained; and see also *Metcalfe v. Brighton Railway*, 27 L. J., C. P. 205.

(r) Sect. 9.

(s) Sect. 10.

(t) *Per Bayley, B., Owen v. Burnett*, 4 Tyrw. 141; 2 Cr. & M. 353.

(u) *Heam v. London and South Western Railway*, 10 Exch. 793; 24 L. J., Exch. 180;

that as the protection given by the first section of this statute is absolute, and without exception or restriction, if any of the goods enumerated in the first section be sent to a carrier for conveyance without a declaration of the nature and value of such goods, or without paying or engaging to pay an increased charge, according to sect. 2, the carrier is not liable for their loss, though it happen by the gross negligence of his servants (*v*). A person who delivers to a carrier goods of the description mentioned in sect. 1, must, in order to fix the carrier with responsibility for their loss, declare to him the nature and value of the goods at the time of their delivery, whether it takes place at his office, or on the road, or elsewhere (*x*); and if the carrier does not demand, either at the time of delivery, or before a loss or injury, the increased rate for carriage to which he may be entitled under the act, he is not protected from his common law liability in case of loss or injury (*y*). Where a carrier makes one contract for carriage partly by land and partly by water, the contract is divisible, so as to bring that part which applies to carriage by land within the statute (*z*).

Although by sect. 4 carriers can no longer by public notice limit their liability at common law with respect to articles not enumerated in the first section, still special contracts with respect to the conveyance of *any* articles may be entered into between the carrier and his customer, and will bind both parties (*a*).

There is a difference of opinion as to whether these notices by which, if brought home to the knowledge of the consignor, carriers could previously to the Carriers Act protect themselves from unforeseen losses not caused by the fraud or negligence of themselves or their servants, acted by way of contract or as restrictions on the public profession of a carrier (*b*). Where notices have been personally served on the senders of goods a jury are bound to infer from the receipt of the notice and the subsequent sending of the goods that a special contract on the terms of the notice has been made (*c*).

By these special contracts all carriers might, and it would seem, all except railway and canal companies still can, relieve themselves from all reponsibility, even if caused by their gross negligence (*d*).

(*v*) *Hinton v. Dibbin*, 2 Q. B. 646. See *Wyld v. Pickford*, 8 M. & W. 443; and *Butt v. Great Western Railway*, 11 C. B. 140; 20 L. J., C. P. 241.

(*x*) *Hart v. Bazendale*, 7 Exch. 769; 21 L. J., Exch. 123, in error, reversing the judgment of the Exchequer.

(*y*) *Behrens v. Great Northern Railway*, 31 L. J., Ex. 299.

(*z*) *Le Conteur v. London and South Western Railway*, 35 L. J., 40 Q. B.

(*a*) *Waller v. York and North Midland Railway*, 2 E. & B. 750; *Chippendale v.*

Lancashire and Yorkshire Railway, 21 L. J., Q. B. 23; *Carr v. Lancashire and Yorkshire Railway*, 7 Exch. 707; *York, N. and B. Railway v. Crisp*, 14 C. B. 527; 23 L. J., C. P. 125. But see now 17 & 18 Vict. c. 31, s. 7, *post*.

(*b*) *Peck v. North Staffordshire Railway*, 32 L. J., Q. B. 269.

(*c*) *Walker v. York and North Midland Railway*, 2 Ell. & Bl. 780.

(*d*) *Carr v. Lancashire and Yorkshire Railway*, 7 Ex. 707.

The Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31), has, however, considerably limited the power of the latter to do this.

The first six sections are framed with a view of compelling railway and canal companies to make arrangements for receiving and forwarding traffic (which, by sect. 1 is to include passengers and their luggage, goods, animals, &c.), without delay and without partiality; and give power to the Court of Common Pleas to enforce this obligation (e). Sect. 7 enacts as follows: "Every such company (*i. e.* railway or canal company) as aforesaid shall be liable for the loss of or for any injury done to any horses, cattle or other animals, or to any articles, goods or things, in the receiving, forwarding or delivering thereof, occasioned by the neglect or default of such company or its servants, notwithstanding any notice, condition or declaration made and given by such company contrary thereto, or in anywise limiting such liability: every such notice, condition or declaration being hereby declared to be null and void: provided always, that nothing herein contained shall be construed to prevent the said companies from making such conditions with respect to the receiving, forwarding, and delivering of any of the said animals, articles, goods or things, as shall be adjudged by the court or judge before whom any question relating thereto shall be tried to be just and reasonable; provided always, that no greater damages shall be recovered for the loss of or for any injury done to any of such animals beyond the sums hereinafter mentioned; (that is to say), for any horse 50*l.*; for any neat cattle, per head, 15*l.*; for any sheep or pigs, per head, 2*l.*; unless the person sending or delivering the same to such company shall, at the time of such delivery, have declared them to be respectively of higher value than as above mentioned; in which case it shall be lawful for such company to demand and receive by way of compensation for the increased risk and care thereby occasioned, a reasonable per centage upon the excess of the value so declared above the respective sums so limited as aforesaid, and which shall be paid in addition to the ordinary rate of charge; and such per centage or increased rate of charge shall be notified in the manner prescribed in the stat. 11 Geo. IV. & 1 Will. IV. c. 68, and shall be binding upon such company in the manner therein mentioned: provided also, that the proof of the value of such animals, articles, goods and things, and the amount of the injury done thereto, shall in all cases lie upon the person claiming compensation for such loss or

(e) See *Ransome v. Eastern Counties Railway*, 26 L. J., C. P. 91; *Caterham Railway v. London and Brighton Railway*, 26 L. J., C. P. 161; *Oxlade v. North Eastern Railway*, 26 L. J., C. P. 129; *Baxendale v. The North Devon Railway*, 3 C. B. (N.S.) 324; *Ransome v. Eastern Counties Railway*, 27 L. J., C. P. 166;

Harris v. Cockermouth and Workington Railway, 27 L. J., C. P. 162; *Cooper v. South Western Railway*, 27 L. J., C. P. 324; *Oxlade v. North Eastern Railway*, 15 C. B. (N.S.) 680; *Baxendale v. Great Western Railway*, 28 L. J., C. P. 89; and *Nicholson v. Great Western Railway*, 28 L. J., C. P. 89.

injury: provided also, that no special contract between such company and any other parties respecting the receiving, forwarding, or delivering of any animals, articles, goods or things as aforesaid, shall be binding upon or affect any such party, unless the same be signed by him or by the person delivering such animals, articles, goods or things respectively for carriage: provided also, that nothing herein contained shall alter or affect the rights, privileges, or liabilities of any such company under the said act of 11 Geo. IV. & 1 Will. IV. c. 68, with respect to articles of the descriptions mentioned in the said act."

After a great difference of opinion as to the meaning of this section it has received its construction from the House of Lords, confirming the view taken of it by the Lord Chief Justice Jervis, in *Simons v. The Great Western Railway Company*. "I take it to be equivalent to a simple enactment that no general notice given by a railway company shall be valid in law for the purpose of limiting the common law liability of the company as carriers. Such common law liability may be limited by such conditions as the court or judge shall determine to be just and reasonable, but with this proviso that any such condition so limiting the liability of the company shall be embodied in a special contract in writing between the company and the owner or person delivering the goods to the company, and which contract in writing shall be signed by such owner or person." *Per Westbury*, Lord Chancellor, in *Peek v. North Staffordshire Railway Company (f)*.

In reference to the decisions upon the reasonableness of the conditions, it is to be observed that many of them have undergone considerable modification by the judgments in *McManns v. Lancashire Railway*, and *Peek v. North Staffordshire Railway Company*, which may be considered as the leading cases upon this part of railway carriers' law. When there are no optional rates, any condition that the company "will not be responsible for any injury or damage howsoever caused," is unreasonable (*g*). So is a condition in a cattle ticket, exempting the company "from any consequences arising from over-carriage, detention, or delay, in conveying the animals, however caused" (*h*). So is a condition "not to be accountable for the loss, detention, or damage of any package, insufficiently or improperly packed" (*i*). And the unreasonable character of a condition that places all the risk of carriage upon the sender is not removed by a second condition granting a free pass to a person having the care of the cattle (*k*). But where a railway company gave public notice that fish would only be conveyed on their

(f) 32 L. J., Q. B. 269, in dom. proc.

(g) *McManns v. Lancashire Railway*, in Ex. Ch., 4 H. & N. 327.

(h) *Allday v. Great Western Railway*, 34 L. J., Q. B. 5; *Gregory v. West Midland Railway*, 2 H. & C. 944; *Booth v.*

North Eastern Railway, 2 L. R. 173 Ex.

(i) *Simons v. Great Western Railway*, 18 C. B. 805, 829; *Garton v. Bristol and Exeter Railway*, 1 B. & S. 112.

(k) *Booth v. North Eastern Railway*, 2 L. R., Ex. 173.

line by special agreement, and that the sender should sign the following conditions, "the company shall not be responsible for loss of market or for other loss or injury arising from delay or detention of train, exposure to weather, stowage, or from any cause whatever other than gross neglect or fraud," the condition was held to be reasonable (*l*). Where there are optional rates, conditions may of course be reasonable which would not be so when the sender had no option. In an early case, which has always been considered one of great authority, it was held, that a condition, "that in the case of goods conveyed at a special mileage rate the company would not be responsible for any loss or damage, however caused," was held reasonable (*m*). And there are several dicta of the judges in recent cases, stating that perhaps it is not unreasonable for a railway company to say that if the sender pays the ordinary rate, they will be responsible, but if he pays a special reduced rate, he must take all risk (*n*). On the other hand, it is difficult to see how such a condition could be considered as reasonable, according to the judgments of the Lord Chancellor *Westbury* and Lord *Wensleydale*, in *Peck v. North Staffordshire Railway Company*. In that case there was a condition that "the company will not be responsible for the loss of or injury to any marbles, unless their value be declared, and they be insured at the rate of 10*l.* per cent. upon their value;" and it was held unreasonable, as the effect would be to exempt the company from loss, however caused. "I am clearly of opinion that it is not reasonable for a carrier to say, 'I will not be liable as a carrier at all for injury by neglect, or any other injury in the course of the carriage of the goods delivered to me unless I receive a price for insuring the goods against all possible loss. I will not be responsible for *any* loss unless you pay me a fixed sum for indemnifying you against *all*,' per Lord *Wensleydale*, and the Lord Chancellor's judgment proceeds on the ground that by the first part of the section it is distinctly stated that any condition, having for its object to relieve a company from liability occasioned by the neglect or default of such company, shall be null and void.

A carrier of passengers and goods to the station of a railway company cannot maintain an action against the company, either at common law or under the above statute, for refusing to admit him with his carriage within the precincts of the station, although the company are in the habit of admitting the public generally (*o*).

(*l*) *Beale v. South Devon Railway*, 3 H. & C. 337, in Ex. Ch.; *Lord v. Midland Railway*, L. R., 2 C. P. 347.

(*m*) *Simons v. Great Western Railway*, 26 E. J., C. P. 25. See also *McAndrew v. Electric Telegraph Company*, 17 C. B. 5; 25 L. J., C. P. 26.

(*n*) *Harrison v. London and Brighton Railway*, 2 B. & S. 123; *Allday v. Great Western Railway*, 34 L. J., Q. B. 5; *Robinson v. Great Western Railway*, 1 H. & R. 97.

(*o*) *Barker v. Midland Railway*, 18 C. B. 46; 25 L. J., C. P. 184.

III. *Of the Lien of Carriers.*

By the custom of the realm, a common carrier is bound to carry the goods of the subject for a reasonable reward, to be therefor paid, by force of which he has a lien as far as the carriage price of the particular goods, but not to any greater extent (*p*). And where the goods are retained by the carrier for such lien, he is bound to take reasonable care of them, and to deal with them in a reasonable manner (*q*). Common carriers have in many instances attempted to extend their lien, so as to cover their general balances, or, in other words, they have claimed a general lien. In *Rushforth v. Hadfield* (*r*), it seems to have been admitted by the court, that the lien claimed by a carrier for his general balance was not founded on the common law, but that such a lien might arise by contract between the owner of the goods and the carrier; and that usage of trade, if general, uniform, and long established, was evidence of such contract (*s*). But it was resolved; that, as *general liens were not to be favoured*, the party who sets up such a claim ought to make out a very strong case, and evidence of a few recent instances of detainer by carriers, for their general balance, would not be sufficient to furnish an inference, that the party who dealt with a carrier had knowledge of the usage, and so to warrant a conclusion, that he contracted with reference to it, and adopted the general lien into the particular contract.

A carrier had given notice that all goods would be subject to a lien, not only for the freight of the particular goods, but also for any general balance due from their respective owners: goods having been sent by the carrier addressed to the order of J. S., a mere factor; it was held, that the carrier had not, as against the real owner, any lien for the balance due from J. S. (*t*). Query,

(*p*) *Skinner v. Upshaw*, Lord Raym. 752.

(*q*) *Crouch v. Great Western Railway*, 27 L. J., Exch. 345.

(*r*) 6 East, 519; 7 East, 224.

(*s*) In *Naylor v. Mangles*, 1 Esp. N. P. C. 109, it was contended, that a *wharfinger* had a lien for his general balance; but Lord *Kenyon*, C. J., said, that "liens were either by common law, usage, or agreement. Liens by the common law were given where a party was obliged by law to receive goods, &c., in which case, as the law imposed the burthen, it also gave him the power of retaining for his indemnity. This was the case of innkeepers; that a lien from usage was a matter of evidence. The usage in the present case had been proved so often, he said, it should be considered as a settled point that wharfingers had the lien con-

tended for." See also *Holderness v. Col-linson*, 7 B. & C. 112, where the court said: "The onus of making out a right of general lien lies upon the wharfinger. There may be an usage in one place varying from that which prevails in another. When the usage is general and prevails to such an extent, that a party contracting with a wharfinger must be supposed consant of it, then he will be bound by the terms of that usage; but then it should be generally known to prevail at that place. If there be any question as to the usage, the wharfinger should protect himself by imposing special terms, and he should give notice to his employer of the extent to which he claims a lien. If he neglects to do so, he cannot insist upon a right of general lien for any thing beyond the mere wharfage."

(*t*) *Wright v. Snell*, 5 B. & A. 350.

whether, if the notice had been, that all goods, to whomsoever belonging, should be subject to a lien for any general balance that may be due from the persons to whom they are addressed, he would have any right to retain the goods for the balance due from J. S. ?

As liens at law exist only in cases where the party entitled to them has the possession of the goods, if a carrier parts with the possession of the goods, after the lien attaches, the lien is gone. An usage for carriers to retain goods as a lien for a general balance of account between them and the consignees, does not affect the right of the consignor to stop the goods *in transitu* (u). A carrier who, by the usage of a particular trade, is to be paid for the carriage of goods by the consignor, has not any right to detain them against the consignee for a general balance due to him for the carriage of other goods of the same sort, sent by the consignor (v). If a passenger book himself to go by a particular coach, and leaves his portmanteau, but does not go by the coach, the carrier will have a lien for something, though not for the whole fare (x).

IV. *By whom Actions against Common Carriers ought to be brought.*

In general the action against a carrier, for the non-delivery or loss of goods, must be brought by the person in whom the legal right of property in the goods in question is vested at the time ; for he is the person who has sustained the loss, if any, by the negligence of the carrier, and whoever has sustained the loss is the proper party to call for compensation from the person by whom he has been injured (y). Hence where a tradesman orders goods to be sent by a carrier, as at the instant when the goods are delivered to the carrier, such delivery operates as a delivery to the purchaser, and the whole property (subject only to the right of stoppage *in transitu* by the seller) vests in the purchaser ; he alone can maintain an action against the carrier for any loss or damage to the goods ; and this rule holds as well where the particular carrier is not named by the purchaser (z), as where he is (a), for the delivery of goods which were to be sent by some carrier, by the vendor on behalf of the vendee to a carrier, although the vendee did not name one, is a delivery to the vendee (b), and the goods are, immediately upon the delivery to the carrier, at the risk of the

(u) *Oppenheim v. Russell*, 3 B. & P. 42.

(v) *Butler v. Woolcott*, 2 B. & P. N. R. 64 ; and see *Small v. Moates*, 9 Bingh. 574.

(x) *Higgins v. Bretherton*, 5 C. & P. 2.

(y) *Dawes v. Peck*, 8 T. R. 330. See

also *Coombes v. Bristol and Exeter Railway*, 27 L. J., Exch. 269, 401.

(z) *Dutton v. Solomonson*, 3 B. & P. 584.

(a) *Dawes v. Peck*, 8 T. R. 330 ; 1 Atk. 248.

(b) *Dutton v. Solomonson*, 3 B. & P. 582.

vendee, although the carrier is to be paid by the vendor (*c*) ; and it holds as well in the case of a carrier by water, as where the goods are conveyed by land. No property, however, passes to the consignee by the consignor's mere delivery to a carrier, the consignee having given no order whatever for the sending (*d*) ; so also where goods are sent to a customer for approval, until acceptance no property vests in the consignee : and so where there has been no acceptance and receipt of the goods, and the contract cannot therefore be "allowed to be" good in consequence of the 17th section of the Statute of Frauds, and no property therefore has passed to the consignee (*e*) : in these cases therefore the action against the carrier for loss is properly brought by the consignor (*f*). So where a laundress sent linen which she had washed to the owner, by the carrier whom she paid, the carrier having lost it ; it was held, that the laundress was the right person to sue : *Parke, J.*, said, "The question is, who employed the carrier, and at whose risk were the goods carried ? The plaintiff paid for the carriage. The owner of the linen was not the employer of the carrier, and the risk of the bailee was not over till the goods were delivered. In the case of a complete sale, the vendor transmits as agent for the vendee" (*g*). So if there have been no written contract or acceptance under the Statute of Frauds the vendor is the right person to sue (*h*).

The plaintiff had shipped goods on board the *Mercurius*, of which the defendant was owner, to be carried from London to Tonningen. The goods were expressed in the bills of lading, to be shipped by order and on account of Hesse and Co. of Hamburgh. The ship arrived in the river Eyder, but was prevented from proceeding to Tonningen by the commander of one of his Majesty's frigates, and ordered to return home. After her return, the captain made an affidavit, that he believed the cargo to be Danish property ; whereupon the goods were unloaded and delivered over to the Admiralty marshal, and libelled in the Admiralty Court ; the plaintiff afterwards recovered them by a proceeding in that court. The action was brought to recover the expenses incurred by the suit in the Admiralty. On the part of the defendant it was insisted, that the goods being shipped by order and on account of Hesse and Co., the property vested in them immediately on their being shipped on board the *Mercurius*. *Darves v. Peck* and *Dutton v. Solomonson*, were cited. It was also urged, that a recovery by the present plaintiff could not protect the defendant from an action at the suit of Hesse and Co. On the part of the

(*c*) *King v. Meredith*, 2 Campb. 639.

(*d*) *Coats v. Chaplin*, 3 Q. B. 483.

(*e*) *Coombes v. Bristol and Exeter Railway*, 3 H. & A. 510 ; 27 L. J., Ex. 401.

(*f*) *Swain v. Shepherd*, 1 M. & Rob. 223, *Parke, J.* ; recognized in *Coats v.*

Chaplin, *ubi sup.*

(*g*) *Freeman v. Birch*, 3 Q. B. 492, n.

(*h*) *Norman v. Phillips*, 11 M. & W. 277 ; *Coombes v. Bristol and Exeter Railway*, 28 L. J., Exch. 401.

plaintiff it was contended, that there was a distinction between the carrying goods from one part of England to another, and the transporting them beyond sea. That after a delivery of goods to a carrier, to carry them from one part of England to another, the vendor had no property in the goods, but only a right of stopping *in transitu*; and it was admitted, that if the goods were directed to be sent by a carrier, without specifying the carrier, the delivery to the carrier was a delivery to the vendee; but urged that, in the case of goods sent abroad, if the goods arrived safe, they were to be paid for: *aliter*, if they do not arrive. Lord *Ellenborough*, C. J.: "They are shipped by order, and on account of Hesse and Co. I can recognize no property but that recognized by the bill of lading." Plaintiff nonsuited (*i*). ♦

It is observable that in the case of *Davis v. James* (*j*) it was held, that the *consignor* might maintain the action, on the ground that the consignor had made himself responsible to the carrier for the price of the carriage.

So, where the action was brought by the consignor, and the plaintiff having averred in his declaration, that the hire was to be paid by him, proof that the hire was to be paid by the consignee was held not to be a variance, on the ground that whatever might be the contract between the vendor and the vendee, the agreement for the carriage was between the carrier and the vendor, the latter of whom was by law liable (*k*). But this doctrine that the consignor is as such always liable for the carriage is no longer held, the rule now being, in the absence of any express contract, that the owner of the goods is liable for it (*l*); and further, if the carriage were to be paid by the consignor, it would not be more than *prima facie* evidence of the goods being at his risk (*m*).

Where, by the bill of lading, the captain was to deliver the goods for the consignor, and in his name to the consignee, and at the time of shipment the consignee had no property in the goods, it was held, that an action against the ship-owners for damage done to the goods, must be brought in the name of the consignor; and this, although the consignee had insured the goods and advanced the premiums of insurance before the arrival of the ship (*n*); for the shipment was made on account of the consignor, at his risk and for his benefit; and it should be remembered "that if an agent acts for me and on my behalf, but in his own name,

(*i*) *Brown v. Hodgson*, 2 Campb. 36. And now by the 18 & 19 Vict. c. 111. s. 1, the *indorsee* of a bill of lading, to whom the property in the goods therein mentioned shall pass by reason of such indorsement, has transferred to and vested in him all rights of suit, &c. See *Thompson v. Dominy*, 14 M. & W. 403; *Horrard*

v. Shepherd, 9 C. B. 297.

(*j*) 5 Burr. 2680.

(*k*) *Moore v. Wilson*, 1 T. R. 659.

(*l*) *Drew v. Bird*, 1 M. & M. 156; *Dommett v. Beckford*, 5 B. & Ad. 521.

(*m*) *King v. Meredith*, 2 Campb. 639.

(*n*) *Sargent v. Morris*, 3 B. & A. 277.

then, inasmuch as he is the person with whom the contract is made, it is no answer to an action in his name to say that he is merely an agent, unless you can also show that he is prohibited from carrying on the action by me." *Per Bayley, J.*

Where goods were delivered to a carrier at Exeter, to convey to Falmouth, and there deliver them to an agent, who was to forward them to the consignee abroad; and the carrier detained the goods on the ground of a lien against the agent for his general balance; it was held, that trover might be maintained against the carrier *at the suit of the consignor* (o). A servant travelling with his master, who has paid for the servant's railway ticket, may sue the railway company in his own name for the loss of his luggage (p); but, a master cannot maintain an action *per quid servitium amisit* against a railway company, for an injury to his servant whilst a passenger on the company's railway, caused by neglect of their duty to *safely carry* the servant according to their contract with him, as such passenger, unless the master was a party to the contract (q). An action lies against the commander of a ship of war who takes the bullion of a private merchant on board, for not safely keeping and delivering it (r). So where the master of a store ship, in the king's service, took in the bullion of a private merchant on freight, from Gibraltar to Woolwich, it was held, that an action lay against him for the loss of the bullion (s).

A common carrier is not estopped from disputing the title of the person from whom he has received goods to carry, and it is an answer to an action of trover against the carrier by such person that the goods have been delivered to the real owner on his claiming them (t).

V. Of the Declaration.

Pleading under the Common Law Procedure Act, p. 364.

Formerly the declaration in actions against common carriers stated their employment as common carriers (u), their liability by the custom of the realm, a delivery to and acceptance by the defendants of the goods to be carried, for a reasonable hire or reward, concluding with the loss or damage to the goods; but afterwards it became usual to declare in *assumpsit*, and not to state either the employment of the defendants as common carriers, or the custom of the realm as to their liability. This form of de-

(o) *Taghlabue v. Wynn*, Cornwall Lent Ass. 1813; Wood, B. MSS.

(p) *Marshall v. York, N. and B. Railway*, 11 C. B. 655; S. C. 21 L. J., C. P. 34.

(q) *Alton v. Midland Railway*, 34 L.

J., Ex. 292.

(r) *Hodgson v. Fullarton*, 4 Taunt. 787.

(s) *Hatchwell v. Cooke*, 6 Taunt. 577.

(t) *Sheridan v. The New Quay Company*, 28 L. J., 58 C. P.

(u) *Herne's Plead.* 76. *Vid. Ent.* 37, 38.

claration has prevailed since the decision of *Dale v. Hall*, M. T. 1750, in which it was settled, that it did not make any difference, whether the plaintiff declared on the custom, or more generally in assumpsit; for, by stating that the defendant carried for hire, it would appear that the defendant was a common carrier, and then the law would raise the promise from the nature of the contract. But although the plaintiff is not bound to allege the custom, yet he must produce sufficient evidence to bring his case within the custom (v). And more recently, where the declaration, which was in case, stated that the plaintiff delivered to the defendants, and they accepted and received from him goods to be conveyed for reasonable reward in that behalf, it was held, that after verdict the declaration might be read, as founded on the general custom of the realm (x). A declaration against a common carrier for refusing to carry goods averred that the plaintiff was ready and willing and offered to pay to the defendant such sum of money as the defendant was legally entitled to receive for the receipt, carriage and conveyance of the goods; it was held, that the declaration was good, and that it was not necessary to allege an actual tender of money for the carriage (y).

The advantage resulting to the plaintiff from declaring in assumpsit previously to the passing of the Common Law Procedure Act was, that he might join the common counts with the special counts in assumpsit, if he had other and distinct causes of action to which they were applicable. The inconvenience was, that it let in a plea of abatement for want of joining all the parties, and excluded the right to join a count in trover. If the plaintiff was desirous of avoiding this inconvenience, he alleged his gravamen as consisting in a breach of duty arising out of an employment for hire, and treated that breach of duty as a tortious negligence. But by the Common Law Procedure Act, causes of action of whatever kind, provided they be by and against the same parties, and in the same rights, may be joined in the same suit (z), and ample powers of amendment, in the case of non-joinder or misjoinder of defendants, are given by the same act (a). Declaring in tort, if the action was brought against several defendants, and some were found guilty, and others acquitted, the plaintiff was, notwithstanding, entitled to judgment against those who had been found guilty (b).

(v) *Per* Lord Hardwicke, C. J., in *Boucher v. Lawson*, H. 9 Geo. II. B. R. Ca. Temp. Hardw. 199, "The custom of the realm is the law of the realm, and consequently it need not be set forth in the declaration." See also *Bretherton v. Wood*, 3 B. & B. 58.

(x) *Pozzi v. Shipton*, 8 Ad. & E. 974.

(y) *Pickford v. Grand Junction Railway*, 8 M. & W. 372.

(z) 15 & 16 Vict. c. 76, s. 41.

(a) *Ibid.* ss. 27—39.

(b) *Govett v. Radnidge*, B. R. 3 East, 62; *Cooper v. South*, 4 Taunt. 802; *Bretherton v. Wood*, 3 B. & B. 54; *Pozzi v. Shipton*, 8 A. & E. 963; and in actions of contract upon such a state of facts the variance is amendable under sect. 37 of the Common Law Procedure Act.

Trover will not, though *case* will, lie against a common carrier for merely *losing* goods entrusted to his care, without any actual wrong (c): but *trover* will lie against a carrier who delivers goods to the wrong person, for then "he is an actor, though under a mistake" (d); and where the owner of goods on board a vessel directed the captain not to land them on the wharf against which the vessel was moored, which the captain promised not to do, but afterwards delivered them to the wharfinger, conceiving that the wharfinger had a lien on the goods for wharfage dues, it was held, that the owner might maintain *trover* against the captain, who could not prove that any wharfage duty was due (e). Although goods are spoiled by the default of the master of the ship, yet the legal owners of the ship at the time are liable in respect of the freight paid to them for their use (f), if charged on the custom of the realm, or as usually carrying for hire, or upon an express undertaking: but not otherwise (g). A ship was chartered to the commissioners of the navy as an armed vessel, who put on board a commander in the navy and a king's pilot, the master and crew being appointed and paid by the owners. In consequence of the improper execution of an order given by the commander, the chartered ship ran foul of another ship. It was held, that the owners of the chartered ship were liable for the injury which the other ship sustained; for the chartered ship, notwithstanding it had an officer on board, was, with regard to third persons, to be considered as the ship of the owners (h).

Pleading under new Rules of Trin. T., 1853.—By the Common Law Procedure Act, sect. 74, it is enacted, "that any plea which shall be good in substance shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong." But by the new pleading rules, Trin. T., 1853, the pleas of *non assumpsit* and not guilty put in issue different facts. These rules state, that "in actions against carriers and other bailees for not delivering or not keeping goods safe, or not returning them on request, the plea of *non assumpsit* will operate as a denial of any express or implied contract to the effect alleged in the declaration, but not of the breach" (i): but that "the plea of not guilty will operate as a denial of the loss or

(c) *Ross v. Johnson*, 5 Burr. 2825; *Kirkman v. Hargreaves*, (case from Lancaster Sum. Ass. 1800, before *Graham*, B.), B. R. H. 41 G. III. MSS. S. P.

(d) *Per Kenyon*, C. J., *Youl v. Harbottle*, Peake's N. P. C. 49, recognized in *Devereux v. Barclay*, 2 B. & A. 704; and see *Wyld v. Pickford*, 8 M. & W. 44.

(e) *Syeds v. Hay*, 4 T. R. 260.

(f) *Boson v. Sandford*, Salk. 440; 3 Lev. 258; 1 Show. 29; 2 Show. 478; *Skin*. 278; 3 Mod. 321; *Carth*. 58, S. C.

See also *Colvin v. Newberry*, 8 B. & C. 166, reversed on error in Exch. Cham. 7 Bingham. 190; 1 Tyrw. 81.

(g) *Boucher v. Lawson*, Ca. Temp. Hardw. 194.

(h) *Fletcher v. Braddick*, 2 B. & P. N. R. 182. See also *Fenton v. City of Dublin Steam Packet Co.*, 8 A. & E. 835; 1 P. & D. 103.

(i) See *Webb v. Page*, 6 Scott's N. R. 951; *Mounsey v. Penott*, 2 Exch. 522.

damage, but not of the receipt of the goods by the defendant as carrier for hire, or of the purpose for which they were received." A declaration alleged that the defendants were common carriers, and received the goods in question to be carried by them as such common carriers for hire and reward. Plea: traversing the averment that they received the goods as common carriers. It appeared that the defendants did not receive any goods to be carried by them, unless the consignor signed a paper containing various conditions (which the court thought were reasonable), subject to which they were to be carried. It was held, that the plea was proved (*k*). A plea, by way of traverse, that the defendants were not common carriers for hire, only puts in issue the fact of the defendants carrying passengers for hire, and not their liability as common carriers by the custom of England (*l*). All matters in confession and avoidance must be pleaded specially. Rules 8 and 17. Where the declaration was at common law, and the defendants pleaded under the Carriers Act, sect. 1, a replication that the loss of the goods was occasioned by the felonious acts of the servants of the defendants, was held good (*m*).

VI. Evidence.

Action against defendants as owners of a coach, for the loss of a parcel. To prove the ownership, on the part of the plaintiff, an entry in the book, kept at the proper office in Somerset House, stating the defendants to be licensed as owners of the coach, was produced; and it was contended, that as the entry was made in pursuance of stat. 25 Geo. III. c. 51, ss. 50, 51, it must be presumed to be accurate, and was at least *primâ facie* evidence; but *Gibbs*, C. J., rejected it, observing that the entry not being signed by the defendants, and nothing being shown to connect them with it, it was no evidence to prove them to be owners of the coach (*n*). The legislature has now made a certified copy of such register evidence of its contents (*o*). The inscription on a stage-coach of the name of the party is evidence, in an action against him, of ownership (*p*).

A parcel, containing bank-notes, stamps, and a letter, was sent by a common carrier, from one stamp distributor to another; it was held (*q*), in an action against the carrier, that the circumstance of the letter accompanying the stamps was *primâ facie* evidence that it related to them, so as to bring the case within the proviso of the

(*k*) *White v. Great Western Railway*, 5 Week. Rep. 488.

(*l*) *Bennett v. Peninsular and Oriental Steam Boat Company*, 6 C. B. 775; 5 C. 18 L. J., C. P. 85.

(*m*) *Melcalfe v. The Brighton Railway*, 27 L. J., C. P. 205.

(*n*) *Strother v. Willan*, 4 Campb. 24. See also *Tinkler v. Walpole*, 14 East, 226; S. P. as to register of a ship.

(*o*) 6 & 7 Vict. c. 86, s. 16.

(*p*) *Barford v. Nelson*, 1 B. & Ad. 571.

(*q*) *Bennett v. Clough*, 1 B. & A. 461.

42 Geo. III. c. 81, s. 6 (r), which enacts, "that the prohibition to send letters otherwise than by the post shall not extend to letters sent by any common carrier, with and for the purpose of being delivered with the goods that the letter concerns:" and that the defendant, not having proved the letter to relate to any other subject-matter, was liable for the value of the parcel.

In an action on the case against a railway company for the loss of a passenger's luggage, it was held to be unnecessary to prove negligence, although the declaration alleged it (s). And where the passenger is a servant, it is sufficient to prove that his master paid his fare (t). In an action brought against the owner of a hack cab for such a loss, the allegation that the defendant promised to carry the plaintiff and his luggage "safely and securely," is proved by the employment of the defendant in the usual way; no express promise to carry on these terms is necessary to be proved (u).

To sustain an action against the keeper of a booking-office for the loss of a parcel, it is not sufficient merely to show non-delivery of the goods to the consignee; and that it had not reached its destination. The office-keeper's duty is to deliver to a carrier; and some evidence must be given showing specifically a breach of that duty (x). By taking charge of a parcel at a booking-office, the office-keeper merely makes himself an agent to book for the stage-coaches; so that he send the parcel to the proper coach-office, and once deliver it there, he has discharged himself; he has nothing to do with the carriage of the goods (y). A parcel was delivered to a porter of a railway company at the station, to be forwarded from Gloucester to London, after the way-bill and the guards' parcel book had been made up. The parcel was placed by the porter in the usual receptacle, a locked box in the luggage van, and entered by him on the way-bill, but the fact of his having so placed it in the box was not communicated to the guard. After several intermediate stoppages the train reached London, where the parcel was missed. It was held, that there was no evidence to go to the jury that the parcel had been stolen by a servant of the company (z).

(r) Repealed by stat. 7 Will. IV. & 1 Vict. c. 32; stat. 7 Will. IV. & 1 Vict. c. 33, excepts from the exclusive privilege of the post office, "Letters concerning goods or merchandize sent by common known carriers, to be delivered with the goods which such letters concern, without hire or reward or other profit or advantage for receiving or delivering such letters."

(s) *Richards v. The London and South Coast Railway*, 7 C. B. 839.

(t) *S. C.* 18 L. J., C. P. 251.

(u) *Ross v. Hill*, 2 C. B. 877.

(x) *Gilbart v. Dale*, 5 A. & E. 543. See also *Midland Railway v. Bromley*, 17 C. B. 352; 25 L. J., C. P. 94.

(y) *Per Lord Abinger*, C. B., in *Muschamp v. Lancaster and Preston Junction Railway*, 8 M. & W. 428.

(z) *Marshall v. York, N. and B. Railway*, 11 C. B. 655; *S. C.* 21 L. J., C. P. 34; *Great Western Railway v. Rimell*, 18 C. B. 575; 27 L. J., C. P. 201.

VII. *Damages.*

In an action brought by the owners of a steam grist mill, against a carrier for delay in delivering the broken shaft of the mill to the plaintiff's engineer, who was thereby prevented from supplying a new shaft, it appeared at the trial that the broken shaft was to be sent to the engineer as a model for a new one, and at the time of the contract for the carriage being made, the carrier was informed that the mill was stopped, and that the shaft must be sent immediately. It further appeared that its delivery at its destination was delayed for several days, and that in consequence the plaintiffs did not receive the new shaft back as they expected, and their mill was kept idle. It was held, that the judge who presided at the trial should have directed the jury that they ought not to take into consideration, in estimating the damages, the loss of profit from not working the mill. *Alderson, B.*, in delivering the judgment of the court, thus explained the principles upon which a jury ought to be guided in estimating the damage arising out of a breach of contract of this kind. "Where two parties have made a contract which one of them has broken, the damages which the other party ought to receive in respect of such breach of contract, should be either such as may fairly and reasonably be considered arising naturally, *i. e.*, according to the usual course of things, from such breach of contract itself, or such as may reasonably be supposed to have been in the contemplation of both parties at the time they made the contract, as the probable result of the breach of it. Now, if the special circumstances under which the contract was actually made were communicated by the plaintiff to the defendant, and thus known to both parties, the damage resulting from the breach of such a contract, which they would reasonably contemplate, would be the amount of injury which would ordinarily follow from a breach of contract under these special circumstances so known and communicated. But, on the other hand, if those special circumstances were wholly unknown to the party making the contract, he at the most could only be supposed to have had in his contemplation the amount of injury which would arise generally, and, in the great multitude of cases, not affected by any special circumstances from such a breach of contract. For had the special circumstances been known, the parties might have specially provided for the breach of contract by special terms as to the damages in that case, and of this advantage it would be very unjust to deprive them. In the present case we find that the only circumstances communicated by the plaintiff to the defendant at the time the contract was made, were, that the article to be carried was the broken shaft of a mill, and that the plaintiff was the miller of that mill. But how do these circumstances reasonably show that the profits of the mill must be stopped by an unreasonable delay in the delivery of the

broken shaft by the carrier to the third person?" (a). In more recent cases, it has been said that the rule laid down in *Hadley v. Baxendale* is not applicable to all cases. "I doubt whether it is the duty of the judge to lay down more to the jury than that the plaintiff is entitled to such damages as are the natural consequences of the breach of contract. The question what are such natural consequences is, I think, in each case rather for the jury than the judge," *per Crompton, J.* (b). When a carrier loses goods, the measure of damages is the market value of the goods at the place of destination at the time when they should have been delivered, or if there be no market for such goods, the cost price and the expenses of transit (if paid), and a reasonable sum for importer's profits (c). In the absence of any special communication to the carrier, the hotel expenses of a commercial traveller during the time that he has been kept waiting for a parcel cannot be recovered (d), nor can the loss of profit that would have been made upon a sale which would have taken place had not the delivery of the goods been delayed until the traveller had left the place of delivery (e). The damages to which a passenger, whom the carrier has failed in his contract to carry, is entitled, are those only which in the ordinary course of things resulted from the breach of contract, and these generally will be the expenses incurred by the passenger in trying to perform, as nearly as he can, the contract which the carrier engaged to do (f).

(a) *Hadley v. Baxendale*, 9 Exch. 341; 23 L. J., Exch. 179. See also *Fletcher v. Tayleur*, 19 C. B. 21.

(b) *Smeed v. Foord*, 1 Ell. & Ell. 616; approved in *Boyd v. Pitt*, 14 Ir. C. L. R. 56. See *Wilde's, B.*, judgment in *Gee v. Lancashire and Yorkshire Railway*, 6 H. & N. 225.

(c) *O'Hanlan v. Great Western Railway*, 34 L. J., Q. B. 154.

(d) *Woodyer v. Great Western Railway*, 2 L. R., C. P. 318.

(e) *Great Western Railway v. Redmayne*, L. R. 1 C. P. 329.

(f) *Hamlin v. Great Northern Railway*, 26 L. J., Exch. 20.

CHAPTER XI.

COMMON.

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I. *Of Right of Common.*

RIGHT of *Common* is an incorporeal hereditament, or a right (lying in grant) which certain persons have to take or use in common a part of the natural produce of land (common of pasture and common of turbary (*a*)), water (common of fishery), wood (common of estovers), &c., belonging to other persons, who have the permanent or limited interest in the soil, &c.

If a person claim by *prescription* any species of *common* in the land of another, and that the owner shall be excluded to have pasture, estovers, or the like; this is a prescription against law to exclude the owner of the soil, for it is against the nature of the word *common* (*b*). But a person may prescribe for the *several* pasture, and exclude the owner of the soil from feeding his cattle there (*c*); and such a right is transferable (*d*). The common over which the right is claimed is generally situate in the same manor in which the tenements lie, in respect of which the right is claimed;

(*a*) See *Davies v. Williams*, 16 Q. B. 546.

(*b*) 1 Inst. 122, a.

(*c*) 1 Inst. 122, a.; *Hoskins v. Robins*, 2 Wms. Saund. 324.

(*d*) *Welcome v. Upton*, 6 M. & W. 536.

but a person may prescribe for right of common over a waste in one manor, in respect of a tenement lying in another; but stronger evidence should be given to establish such a right than in ordinary cases. A person may have two distinct substantial grants of right of common over different wastes, from *different lords*, in respect of the *same* tenements; and immemorial usage is evidence of such distinct grants (*d*).

If A. has a common by prescription, and takes a lease of the land for twenty years, whereby the common is suspended; after the years ended, A. may claim the common generally by prescription; for the suspension was to the possession only, and not to the right, and the inheritance of the common did always remain (*e*). Title once gained by prescription or custom, cannot be lost by interruption of the possession for ten or twenty years; but by interruption in the right it may; as if a man had a rent or common by prescription, unity of possession of as high and perdurable estate, is an interruption in the right. 1 Inst. 114, b (*f*). Declaration stated that the plaintiff was possessed of a messuage and land, in right of which he was entitled to common for all his commonable cattle levant and couchant, on a common called Bentry Heath, and that defendant had enclosed the same. At the trial it appeared that the messuage and land, in respect of which the right of common was claimed, had about fifty years ago vested in the lord by forfeiture, and that he re-granted the same as a copyhold with its appurtenances. It was contended that the right of common became extinguished, and that the re-grant of it as a copyhold with its appurtenances did not re-create the right of common. But *per Abbott, C. J.*, "When a copyhold tenement is seized into the hands of the lord, it does not thereby lose its right of common; for that right is annexed to all tenements demised or demisable by copy of court roll; and while the estate remains in the lord, it continues demisable" (*g*).

II. Of Common of Pasture.

Common of Pasture is, where one person has, in common with other persons, the right of taking, by the mouths of his cattle, the herbage growing on land of which some other person is the owner. Common of Pasture is either common appendant, common appurtenant, or common in gross.

With respect to two other kinds of common of pasture, which are sometimes mentioned in the books, *viz.* common of vicinage, and common in gross *sans nombre*, or without stint; it may be observed, that the former cannot, strictly speaking, be a *right of*

(*d*) *Hollinshead v. Walton*, 7 East, 485.

(*e*) 1 Inst. 114, b.

(*f*) When a prescription or custom

makes a title of inheritance, the party cannot alter or waive the same in pais.

(*g*) *Badger v. Ford*, 3 B. & Ald. 153.

common, for if it were, it would prevent an inclosure, which it has been always held that it will not (*h*). The truth is, "it is but matter of excuse for a trespass" (*i*). Where the inclosure is incomplete, common by vicinage still continues (*j*). An actual undisturbed inter-communing of cattle must be shown. It is not sufficient to show that there was no fence between the two districts, and that the cattle in fact strayed; it must be shown that they fed without molestation (*k*). Such common may, it seems, exist between two adjoining proprietors by *prescription*, although not by custom (*l*). As to common in gross *sans nombre*, it has been truly said, that the notion of this species of common, in the latitude in which it was formerly understood, has been exploded long ago, and it can have no rational meaning, but in contradistinction to stinted common, where a man has a right to put in such a particular number of cattle only (*m*). In *Mellor v. Spateman*, (1 Wms. Saund. 346 d.) *Kelynge*, C. J., said positively, that there could not be any common in gross *sans nombre*. And it has been held that a claim of a right of common, without stint, as annexed to an ancient messuage, without land, could not be supported, such a right of common not existing in law (*n*).

Common Appendant is of common right (and therefore a man need not prescribe for it) for beasts commonable, that is, that serve for the maintenance of the plough, as horses and oxen, and for kine and sheep to manure the land (*o*), and is appendant to *ancient arable land* only (*p*). It must have existed from time immemorial (*q*), but it ought not to be claimed by prescription. The proper way of pleading it is, that the party was seised in fee of certain arable land, to which he had common appendant in the *locus*. See 4 Hen. VI. 13, a. It must be claimed in the waste of the lord, not for a certain number of cattle, but for such only as are *levant* and *couchant* on the land, and therefore it cannot be severed, not even for a moment, nor turned into common in gross.

"The reason for common appendant appears to be this: that as the tenant would necessarily have occasion for cattle, not only to plough, but likewise to manure his own land, he must have some place to keep such cattle in, while the corn is growing on his own arable land; and therefore of common right (if the lord had any waste) he might put his cattle there, when they could not go on his own arable land;—hence it is plain, that the tenant can only have a right of common for such cattle as are *levant and couchant* on his estate, that is, for such and so many as he has occasion for

(*h*) *Musgrave v. Cave*, Willes, 322.

(*i*) *Prichard v. Powell*, 10 Q. B. 603.

(*j*) *Gullett v. Lopes*, 13 East, 348.

(*k*) *Clarke v. Tinker*, 10 Q. B. 604.

(*l*) *Jones v. Robin* (*in error*), 10 Q. B. 620.

(*m*) *Bennett v. Reeve*, Willes, 232.

(*n*) *Benson v. Chester*, 8 T. R. 396.

(*o*) 1 Inst. 122, a.; Bro. Abr. Common, 1, 11, 35.

(*p*) 4 Rep. 37, b.; Willes, 322.

(*q*) 26 H. IV. 13 a.

to plough and manure his land, in proportion to the quantity thereof."—"It is plain that a person cannot have a right of common appendant for cattle which he borrows, unless he make use of them all the year to plough or manure his land" (r). "Levancy and couchancy mean the possession of such land as will keep the cattle claimed to be commoned during the winter; and as many as the land will maintain during the winter shall be said to be levant and couchant (s)."

Common appendant, being of common right, may be apportioned, by alienation of part of the land to which the common is appendant (t); and if the land be divided ever so often, each parcel of land is entitled to common appendant (u). Although the commoner purchases part of the land in which he is entitled to common, yet the common shall be apportioned (v), because common appendant is of common right; but otherwise it is of common appurtenant (x).

Common Appurtenant is a right of common founded on a grant (y), or prescription (which supposes a grant), annexed to the enjoyment of land. This species of common may be granted for all manner of cattle, that is, not only for those which serve for the maintenance of the plough, and to manure the land, but for swine, goats, and the like (z). It may be granted for an unlimited number, or for a certain number of cattle. Where common appurtenant is granted for an unlimited number of cattle, the measure of profit which the commoner is to have, is, as in the case of common appendant, levancy and couchancy (a); and, consequently, like common appendant, such common appurtenant cannot be converted into common in gross. But common appurtenant for a certain number of cattle may be granted over, and so become common in gross. Such a right cannot be claimed by prescription by the occupiers for the time being of a certain messuage (b).

Common appurtenant may be granted at this day (c), and may be apportioned by a conveyance of part of the land to which the right is appurtenant (d). This point was determined also in *Sacheverill v. Porter*, Cro. Car. 482, where a right of common in a waste having been granted to A. (who was seised of lands in S.), and all his tenants in S., for all commonable cattle, and A. conveyed parcel of the lands in S.; it was held, that the alienee was entitled to common for all his commonable cattle, levant and couchant, on the parcel of the lands conveyed.

(r) *Bennett v. Reeve*, Willes, 231, per Willes, C. J.

(s) *Per Buller, J., Scholes v. Hargreaves*, 5 T. R. 48. See *Rogers v. Benstead*, post, "Levancy and Couchancy."

(t) 1 Inst. 122, a.

(u) *Per Willes, C. J., Willes*, 230.

(v) *Wilde's case*, 8 Rep. 79, a.

(x) 1 Inst. 122, a.

(y) Cro. Car. 482.

(z) 1 Inst. 122, a.

(a) 1 Rol. Abr. 398, (I) pl. 1; *Drury v. Kent*, Cro. Jac. 15.

(b) *Davies v. Williams*, 16 Q. B. 546.

(c) *Cowlam v. Slack*, 15 East, 108.

(d) Hob. 235; 1 Inst. 122, a.

Common appurtenant, as well as common appendant, may become extinct by unity of possession (*d*). And where common appurtenant has been extinguished by unity of possession, a new right of common is not created by a deed granting the messuage and land, with all common *thereto belonging*; although the occupiers of the tenement have used the common since the extinguishment. Otherwise, if the language of the deed had been, "all commons *used* therewith (*e*).²" To an action of trespass the defendant pleaded a prescriptive right of common for all his cattle, levant and couchant, upon a messuage, *cum pertinentiis*; on demurrer, the prescription was held good, for that the messuage comprehended a curtilage, which might be an acre or more, upon which the cattle might be levant and couchant (*f*). In an action for disturbing the plaintiff's right of common, it appeared that the plaintiff, who claimed the common in respect of a messuage for *all* commonable cattle, levant and couchant, was the owner of a small house, wherein he carried on the trade of a butcher. The house had neither land, curtilage, nor stable belonging to it, but under the shop-window was a sheep-hold, which would contain four or five sheep at a time, but neither horse nor bullock could be kept there: Lord *Kenyon*, C. J., at the trial, being of opinion, that levancy and couchancy was not proved, as the plaintiff had not shown that he was in possession of land whereon the cattle might be levant and couchant, nonsuited the plaintiff; and the court confirmed his opinion (*g*).

Common of pasture, without land, for a certain number of cattle, may be parcel of a manor, and demised and demisable by copy of court-roll; and, if it be thus claimed in pleading by the lord of the manor, the plea will be good, although he does not describe the common as common appendant, appurtenant, or in gross, since it must be taken to be common appurtenant; for, not being claimed as incident to arable land, but to the manor, for a certain number of cattle in the soil of another, it cannot be common appendant; nor can it be taken to be common in gross, being stated in the plea to be parcel of a manor; then it must be common appurtenant, the only remaining sort of common (*h*).

Common in gross is so called, because it does not appertain to any land, and it must be by grant or prescription (*i*). This species of common may be granted for all manner of cattle, and for an unlimited number, or for a certain number of cattle. If granted for an unlimited number, it seems that the grantee may put on any number of cattle, provided he leaves sufficient common for the lord; if granted for a certain number, the enjoyment of the right is of course limited by the number specified in the grant. A corporation may prescribe for common in gross for cattle *levant and couchant*

(*d*) *Bradshaw v. Eyre*, Cro. Eliz. 570.

(*e*) *Clements v. Lambert*, 1 Taunt. 205.

(*f*) *Scambler v. Johnson*, 2 Show. 248.

(*g*) *Scholes v. Hargreaves*, 5 T. R. 46.

(*h*) *Musgrave v. Cave*, Willes, 319.

(*i*) 1 Inst. 122, a.

within the town, but not for common in gross *sans nombre* (*j*). And so may an individual burgess, but in such a case the grant must be described as a grant to the corporation *for* the individual burgesses, &c., and not to the burgesses, &c. of whom the plaintiff or defendant is one, or the variance will be fatal (*k*). A copyholder who has common in a waste, without the manor of which his copyhold is parcel, has it annexed to the land, and not to his customary estate, and must prescribe in a *que estate* through his lord, for him and all his customary tenants thereof. And such common without the manor is not extinct by the enfranchisement of the copyhold, though there be no words of re-grant. And, after enfranchisement, the feoffee must prescribe in a *que estate* of his lord for himself, and his customary tenants, till the time of the enfranchisement, and since that time for the feoffee and his heirs, as appurtenant to the enfranchised tenement (*l*).

III. *Of the Interest of the Owner of the Soil, subject to Right of Common.*

In land subject to a right of common, the right of the lord or owner of the soil ought to be so exercised as not to injure the right of common. The customary tenants of a manor may even allege a custom to have the sole and several pasture in the soil of the lord for *the whole year*, and thereby exclude the lord. In this case, however, the lord may distrain, for *other* damage in his soil, the cattle of any who have no right to put in their cattle, although he has not any interest in the herbage, for he has an interest in the mines, trees, bushes, &c. (*m*). *E converso* the right of the commoners may be subservient to the right of the lord in the soil, so that the lord may dig clay-pits there, or empower others to do so, without leaving sufficient herbage for the commoners, if it can be proved that such a right has been constantly exercised by the lord (*n*). So the lord may, with the consent of the homage, grant part of the soil for building, if he has immemorially exercised such right (*o*). The immemorial exercise of such right by the lord is evidence that he reserved that right to himself, when he granted the right of common to the commoners. In like manner, there may be a valid custom in a manor for the lord, with the assent of the homage, to grant parcels of the waste to be holden by copy of court-roll, and for the grantees to inclose the same, and to hold them in severalty against the commoners, and in exclusion of their rights (*p*).

(*j*) *Mellor v. Spateman*, 1 Wms. Saund. 324; 1 Vent. 164.

(*k*) *Parry v. Thomas*, 5 Exch. 37.

(*l*) *Barwick v. Matthews*, 5 Taunt. 365.

(*m*) *Hoskins v. Robins*, 2 Wms. Saund.

(*n*) *Bateson v. Green*, 5 T. R. 411.

(*o*) *Folkard v. Hemmett*, 5 T. R. 417, n.

(*p*) *Boulcott v. Winmill*, 2 Campb. 261.

If a commoner having a right of common for one beast, put on two, the lord can only distrain the one put on last, unless they were both put on together (*q*). It was held in the case deciding this point that the plea, justifying the taking as a surcharge, must show whether they were put on together or separately; and if the latter, which was put on first; but in a subsequent case (*r*), a similar plea did not contain such a statement, and no objection was made to it on that account, although it was argued on demurrer, and the court delivered a considered judgment. The only question made was, whether one commoner could distrain the cattle of another commoner who had surcharged the common, which was determined in the negative.

IV. Of Approvement and Inclosure.

By the statute of Merton, 20 Hen. III. c. 4 (*s*), lords of wastes, woods, and pastures, in which their tenants have common of pasture, may approve such wastes, &c., provided sufficient pasture, with a sufficient ingress and egress, is left to the tenants. An owner *pur autre vie* of a common may approve under this statute, and 13 Edw. I. st. 1, c. 46; and may erect on the common a house necessary for the beast-keepers, for the care of the cattle of himself and other persons having right of common there (*t*).

If the lord make a feofment of the waste, &c., the feoffee may approve, leaving a sufficiency of common; and this rule holds, although the lord continues seised of the manor within which the waste lies; for though in the statutes of Merton and Westminster the lord only is mentioned, yet as in those days statutes were not drawn with that fulness of expression with which they are at the present time, the term "lord of the manor" must be considered as equivalent to "owner of the soil," where they stand in the same predicament. It is not necessary, therefore, that the person approving should be lord of the manor; a seisin in fee of the waste, &c., is sufficient (*u*). It is worthy of remark, that the statute of Merton does not empower the lord to approve against any other right of common, except that of common of pasture, appendant or appurtenant (*x*). It does not extend to common in gross, the words of the statute being *quantum pertinet ad tenementa sua* (*y*), nor to common of piscary, of turbary (*z*), estovers, and the like, the words used throughout the statute being *pastura et communia pasturæ* (*a*). But though the lord cannot approve against common

(*q*) *Ellis v. Rowles*, Willes, 638.

(*r*) *Hall v. Harding*, 4 Burr. 2426.

(*s*) Extended by 13 Edw. I. stat. 1, c. 46, to approvements by lords against their neighbours—Confirmed by 3. & 4 Edw. VI. c. 3; 8 & 9 Vict. c. 118.

(*t*) *Patrick v. Stubbs*, 9 M. & W. 830.

(*u*) *Glover v. Lane*, 3 T. R. 445.

(*x*) 2 Inst. 87.

(*y*) 2 Inst. 86.

(*z*) *Grant v. Gunner*, 1 Taunt. 435.

(*a*) 2 Inst. 87.

of turbary, yet where there is common of pasture and common of turbary in the same waste, the common of turbary will not prevent the lord from justifying an inclosure against the common of pasture, if he leaves sufficient: for they are two distinct rights, and the concurrence of these rights in one person will not make any difference (*b*). In like manner, the lord of the manor, or his grantee, may justify an approvement or inclosure against tenants having common of pasture, although they have a further right of digging sand, &c., if sufficient common of pasture be left (*c*). It is, however observable, that if the inclosure operates, in fact, as an injury to the other rights, the commoner will be entitled to an action for such injury (*d*). By the approvement of part, agreeably to the rule laid down in the statute of Merton, that part is discharged of the common, insomuch, that if the tenant who has the common purchases that part, his common is not extinguished in the residue (*e*).

If the lord incloses any part, and does not leave sufficient common in the residue, the commoner may break down *the whole* inclosure which is *upon* the common, even although he can enter without throwing down any part of it (*f*). But if the common has been inclosed twenty years, the commoner cannot make an entry, and even before the 3 & 4 Will. IV. c. 27, must have brought an assize of common (*g*). A custom for the lord to inclose without limit is bad, as tending to destroy the rights of the commoner altogether, but a custom to inclose (even as against a common right of turbary), leaving sufficiency of common, is good; but the onus of proving a sufficiency left lies on the lord (*h*).

By 29 Geo. II. c. 36, the lords and tenants may inclose part of the common for the purpose of planting and preserving trees fit for timber or underwood. By 31 Geo. II. c. 41, these powers are declared to be vested in tenants for life, or years determinable on lives. By 13 Geo. III. c. 81, provision is made for the better cultivation of common field lands, by agreement amongst the occupiers and owners (*i*), for regulating, altering, &c., in a similar manner the time of opening and shutting up stinted commons, and power is given (by sect. 15) to lords of manors, with the consent of three-fourths of the commoners, to lease by auction a twelfth of the waste for any term not exceeding four years, the net rent to be applied to the improvement of the residue of the waste. By 4 & 5 Vict. c. 38, s. 2, a lord of a manor may convey any quantity of land not exceeding one acre, as a site for a school for the education of poor persons; and where any portion of waste or commonable

(*b*) *Fawcett v. Strickland*, Willes, 57.

(*c*) *Shakespeare v. Peppin*, 6 T. R. 741.

(*d*) *Fawcett v. Strickland*, Willes, 57.

(*e*) 2 Inst. 87.

(*f*) *Arlett v. Ellis*, 7 B. & C. 346; 9 *ibid.* 671, S. C.

(*g*) *Creach v. Wilmott*, 2 Taunt. 160.

See *Tapley v. Wainwright*, 5 B. & Ad. 395.

(*h*) *Arlett v. Ellis*, *supra*.

(*i*) See *Whiteman v. King*, 2 H. Bl. 4; 6 & 7 Will. IV. c. 115; 3 & 4 Vict. c. 31.

land shall be gratuitously conveyed by any lord for such purpose, the rights of all persons in the land are barred by the conveyance. And by 7 & 8 Vict. c. 37, s. 3, any deed which shall have been or shall be executed under the powers or for the purposes of 4 & 5 Vict. c. 38, without any valuable consideration, shall be valid, if otherwise lawful, although the donor shall die within twelve calendar months from the execution thereof.

By the General Inclosure Act, 41 Geo. III. c. 109, the provisions usually inserted in private enclosure acts are consolidated. Allotments under private enclosure acts make the land allotted freehold, unless the act otherwise directs (*k*). Under the above act the legal title to the land allotted does not vest in the allottee until the execution and proclamation of the award (*l*); though the local act may, by proper words, give the legal seisin and estate upon allotment only (*m*). But by the 1 & 2 Geo. IV. c. 23, s. 2, it shall be lawful for any allottee, who has or shall be put into possession of his allotment by an order of the commissioners in writing according to the form given in the schedule to that act and signed by the commissioner or commissioners, his tenant or servant, "to commence, prosecute and maintain any action or suit at law for any injury or damage that may be done or committed by any person or persons whomsoever to the ground, soil or herbage of any such allotment or allotments, or to the walls, hedges, fences, ditches, gates, posts, rails, stiles, cloughs, bridges or tunnels already erected or to be erected in or upon any such allotment or allotments, and to bring, maintain or prosecute any action or actions of ejectment for recovering the possession of any such allotment or allotments, or any part or parts thereof, from any person or persons whomsoever, notwithstanding the award or awards of the commissioner or commissioners appointed in or named by or by virtue of any such act or acts now made or passed, or to be hereafter made and passed, shall not be executed and perfected by such commissioner or commissioners by virtue or in pursuance of any such act or acts of parliament, any thing in any act or acts, or any construction of or implication from any act or acts, or any law, usage or custom to the contrary in anywise notwithstanding" (*n*).

By sect. 13 of the General Inclosure Act, provision is made for the allottees of small allotments depasturing their allotments in common without any enclosure thereof, subject to "such orders and regulations for the equitable enjoyment thereof, and for the participation of any produce grown or to grow thereon, as such commissioner or commissioners may think beneficial and proper." By sect. 14, the allotments when made are to be in full bar and satisfaction of all rights of common and other rights previously existing in the lands enclosed, and, on the making of the award

(*k*) *Doe v. Davison*, 2 M. & S. 175.

(*l*) *Farrer v. Billing*, 2 B. & Ald. 171.

(*m*) *Doe v. Saunder*, 5 A. & E. 664.

(*n*) And see 11 & 12 Vict. c. 99, s. 11.

(or before, if the commissioners so direct) all rights of common and other rights intended to be extinguished shall cease and determine.

Section 35 provides for the due execution of the award by the commissioners, its enrolment within twelve calendar months, or so soon as conveniently may be, in one of her Majesty's courts of record at Westminster, or with the clerk of the peace for the county (o); and for the delivery by the officer of the court or the clerk of the peace to any person requesting the same, of "a copy of the said award, or any part thereof, signed by the proper officer of the court, wherein the same shall be enrolled, or by the clerk of the peace for such county or his deputy, purporting the same to be a true copy;"—"And the said award, and each copy of the same or of any part thereof signed as aforesaid, shall at all times be admitted and allowed in all courts whatever as legal evidence, &c." The award when made relates back to the time of allotment (p); and it need not contain all the authorities the commissioners had, the presumption being, that they acted according to their jurisdiction, until the contrary appears (q).

By the 8 & 9 Vict. c. 118, certain powers for the enclosure and improvement of commons, &c., are given to "The Inclosure Commissioners for England and Wales,"—"who shall cause to be made a seal of the said board, and shall cause to be sealed therewith all awards and orders made or confirmed by the commissioners, in pursuance of this act; and all such awards and orders and other instruments proceeding from the said board, or copies thereof, purporting to be sealed with the seal of the said board, shall be received in evidence without any further proof thereof, &c." (s. 2) (r).

The 94th section enacts, that all the land exchanged, partitioned or allotted under the act shall be held by the person to whom it is given in exchange, &c., under the same tenures, rents, customs and services, as the land in respect of which it shall have been so given in exchange, &c., and the land exchanged, partitioned or allotted in respect of leasehold land shall be deemed leasehold, and be held under the same rents and covenants as the land in respect of which it may have been allotted, and the remainder or reversion thereof shall be vested in the same lessor respectively as the remainder or reversion of such other land was vested before the exchange, &c., except where otherwise directed by the act.

The 104th section provides for the drawing up and confirmation of the award by the commissioners, "under their hands and seal,"

(o) Any omission to enrol it in due time is remedied by the 3 & 4 Will. IV. c. 87.

(p) *Doe v. Willis*, 5 Bingh. 441.

(q) *Goodtitle v. Milburn*, 2 M. & W.

853.

(r) The 69th section enables the valuer to extinguish or suspend rights of common during the inclosure.

and the 105th section enacts, "That such confirmation as aforesaid shall be conclusive evidence that all the directions of this act in relation to such award, and to every allotment, exchange, partition, and matter therein set forth and contained, which ought to have been obeyed and performed previously to such confirmation, shall have been obeyed and performed, and no such award shall be impeached by reason of any mistake or informality, &c., and every allotment, exchange, &c., specified and set forth in such award as aforesaid shall be binding and conclusive on all persons whomsoever."

The 146th section enacts—"That two copies of every confirmed award shall be made, and sealed with the seal of the said commissioners, and one such copy shall be deposited with the clerk of the peace of the county in which the lands inclosed shall be situate, who is hereby required to deposit and keep the same among the records of the said county, so that recourse may be had thereto by any persons interested in the premises, and the other copy shall be deposited with the church or chapel-wardens for the time being of the parish in which the lands or the greater part thereof shall be situated, to be kept by them and by their successors in office, with the public books, writings and papers of the parish, or shall be deposited with such other fit persons as the commissioners shall approve; and all persons interested therein may have access to and be furnished with copies of or extracts from any such copy, on giving reasonable notice to the person having custody of the same, and on payment of two shillings and sixpence for such inspection, and after the rate of threepence for every seventy-two words contained in such copy or extract, and all such copies of and extracts from any such copy of any confirmed award as shall be furnished by the clerk of the peace shall be signed by the said clerk of the peace or his deputy, purporting the same to be a true copy, and every such copy and extract so signed shall be received in evidence without further proof thereof, and every recital or statement in such confirmed award, or any sealed copy thereof, shall be deemed satisfactory evidence of the matters therein recited or stated."

Regulated Pastures (s).—The 113th section enacts, "That it shall be lawful for the commissioners on the application in writing of persons interested in any land which shall be directed to be inclosed under this act, whose interest shall exceed in value one half of the whole interest in such land (such application to be made at any time before the instructions to the valuer shall have been delivered to him under the seal of the commissioners as hereinbefore provided), to direct such land or any part thereof to be converted into and used as a regulated pasture, to be stocked and depastured in common by the persons interested therein, in pro-

portion to their respective rights and interests as the same shall be determined on the examination of claims, and in case part of such land only shall be so directed to be stocked and depastured in common, the valuer shall, subject to the instructions which shall be given to him under the provisions of this act, ascertain and set out the part which shall be so used as a regulated pasture, and shall direct how and at whose expense the same shall be fenced and divided from the residue of such land, and the valuer, acting in the matter of such inclosure, shall, in every case where land shall be so directed to be used as a regulated pasture, ascertain and allot the respective stints or rights of pasturage, (specifying the respective numbers of the respective kinds of stock or animals to be admitted to the pasture in respect of such respective stints or rights of pasturage, with such option as to equivalent numbers of the respective kinds of stock and animals as he shall think just, and if he shall think fit, specifying the time during which such stock or animals may be kept on the pasture,) as he shall adjudge and determine to be proportionate to the value of the respective rights and interests of the persons interested as aforesaid, &c."

The 116th section enacts, "That the right of soil of and in all land which shall be converted into regulated pastures, shall, subject to the right of the lord of the manor to all or any of the mines, minerals, stone and other substrata, where the same shall be reserved to him under this act, and to the other rights given or reserved by this act, and the award in the matter of such inclosure, be vested in the persons, who, under the directions and determinations of such award, shall be owners of the stints or rights of pasture therein, in proportion to the shares or aliquot parts which such stints shall be thereby declared liable to of any rate under this act, as tenants in common."

Exchange of Right of Common.—The 9 & 10 Vict. c. 70, s. 11, empowers the commissioners, on the application of the parties interested in any undivided share, or any cattle gate or other gate or any right of common defined by numbers or stints over any land (whether subject to be inclosed or not), to make an *order of exchange* of such respective shares without the concurrence of the other persons interested in the land. The provisions of the 8 & 9 Vict. c. 118, and this act, applicable to the exchange of *land*, are to be applicable to such exchange, except that, instead of a map, a sufficient description of the shares, rights, &c., so exchanged, and of the land on which the exchange is to operate, may be inserted in the order or annexed thereto (t).

The Metropolitan Common Act (29 & 30 Vict. c. 22) prevents the future inclosure of commons within the metropolitan police district, and makes provision for their improvement.

(t) See further on the subject of inclosure, 10 & 11 Vict. c. 111; 11 & 12 Vict. c. 99; 12 & 13 Vict. c. 83; 20 & 21 Vict. c. 31.

V. *Of the Remedy for Disturbance of Right of Common (u).*

Whatever destroys the right of common is a nuisance, and may be abated by the commoner, provided it can be done without interfering with the lord's right to, or interest in, the soil (x). But if the nuisance cannot be abated without such interference, the commoner must resort to his action on the case, and have satisfaction in damages. If the right of common be partially injured, the commoner ought not to abate the cause of such injury, more especially if in so doing he must necessarily interfere with the right to the soil. On this principle it was held, in *Cooper v. Marshall*, 1 Burr. 265, that a commoner could not justify digging up the soil and destroying the coney-burrows erected in the common by the lord, who was entitled to free warren there. So where the lord had planted trees on the common, and the commoner cut them down, it was held, that the lord might maintain trespass, and that the commoner could not justify the abatement of the trees (y). Where a house obstructs the exercise of a right of common, the commoner may, *after notice* and request to the plaintiff to remove the house, pull it down, though the plaintiff is actually inhabiting and present in the house (z).

The usual remedy adopted by commoners is an action on the case for a disturbance of the right of common, which may be maintained either against the lord or the owner of the soil, a stranger, or a commoner (a). If the action is brought against the wrong-doer, title being only inducement, it is not necessary to set it forth; it will be sufficient for the plaintiff to state in his declaration, that he was possessed of a certain quantity of land, &c., and by reason of such possession was entitled to the right, in the exercise of which he was disturbed; *secus*, if it be brought against the lord (b). The right must be truly stated, for otherwise the variance will be ground of nonsuit (c). If, to an action on the case by a commoner for injuring his right of common, the defendant plead that he dug turves under a licence from the lord, he should add, that sufficient common was left for the commoner; and if he do not, the plaintiff is not obliged to reply, that there was not sufficient common left; because it is the gist of the action, and set forth in the declaration (d). Case for disturbing the plaintiff's right of common by turning on cattle; defendant pleaded a right of common in himself and justified turning on the cattle, being his own commonable cattle levant and couchant on his land; plaintiff must new assign, if he intends to prove a surcharge (e).

(u) As to the commoner's remedy against the lord in equity, see *Powell v. Powis*, 1 Y. & J. 159.

(x) 2 Inst. 88.

(y) *Kirby v. Sadgrove* (in error), 1 B. & P. 13.

(z) *Davies v. Williams*, 16 Q. B. 546.

(a) *Hassard v. Cantrell*, Lutw. 101.

(b) *Greenhow v. Ilsey*, Willes, 621.

(c) *Beadsworth v. Torkington*, 1 Q. B. 782.

(d) *Greenhow v. Ilsey*, Willes, 619.

(e) *Bowen v. Jenkin*, 6 A. & E. 911.

In this action the plaintiff must prove an injury sustained, but any injury in the minutest degree is sufficient; *e.g.* the taking away the manure which has been dropped on the common by the cattle, although the proportion of the damage sustained by the plaintiff be found to amount to a farthing only (*f*); for if, where the injury was small, a commoner could not maintain an action, a mere wrongdoer might by repeated torts in course of time establish evidence of a right of common (*g*).

VI. *Of Surcharges by Commoners.*

Formerly, if one of the commoners had surcharged the common, that is, had put more cattle into the common than he was entitled to, the commoner who was aggrieved might sue out a writ of admeasurement of pasture, and by that suit the common was admeasured in respect of all the commoners, as well those who had not surcharged as those who had surcharged it, and the person who brought the action (*h*). An action on the case has been substituted in the place of this writ of admeasurement, as a more easy and speedy remedy; and it has been held that this action may be maintained by one commoner against another for a surcharge, although the plaintiff himself has been guilty of a surcharge (*i*). In the declaration, it is not necessary for the plaintiff to set forth the defendant's right of common, and show in what manner he has exceeded that right, by putting on a greater number or an improper species of cattle; but the disturbance may be alleged generally, "that the defendant wrongfully and injuriously ate up and depastured the grass on the common with divers sheep and lambs (*k*). Neither is it necessary that the plaintiff should state that he was exercising his right of common at the time of the surcharge (*l*). But it seems from *Smith v. Feverel*, 2 Mod. 6, and from a dictum of the court in *Hassard v. Cantrell*, Lutw. 107, that in an action against the *lord* it is necessary to show a particular surcharge.

VII. *Prescription—2 & 3 Will. IV. c. 71.*

To an action of trespass *quare clausum fregit*, the defendant may plead a right of common of pasture, of common of turbary, and of common of estovers.

By 2 & 3 Will. IV. c. 71 (*m*), it is enacted, "That no claim

(*f*) *Pindar v. Wadsworth*, 2 East, 154.
See cases cited by Taunton, J., in *Mazzetti v. Williams*, 1 B. & Ad. 426, and *Blofeld v. Payne*, 4 B. & Ad. 410.
(*g*) See *Patrick v. Greenway*, 1 Wms. Saund. 346, *b.*, n. (2).

(*h*) F. N. B. 125, B.
(*i*) *Hobson v. Todd*, 4 T. R. 71.
(*k*) *Atkinson v. Teasdale*, 3 Wils. 278.
(*l*) *Wells v. Watling*, 2 W. Bl. 1233.
(*m*) See further on the subject of this statute, *post*, tit. "Nuisance."

which may be lawfully made at the common law by custom, prescription, or grant, to any right of common or other profit or benefit, to be taken and enjoyed from or upon any land of the king, his heirs or successors, or any land, being parcel of the Duchy of Lancaster, or of the Duchy of Cornwall, or of any ecclesiastical or lay person, or body corporate, except such matters and things as are herein specially provided for, and except tithes, rent, and services, shall, where such right, profit, or benefit, shall have been actually taken and enjoyed by any person claiming right thereto⁽ⁿ⁾, without interruption^(o), for the full period of thirty years, be defeated or destroyed by showing *only* that such right, profit, or benefit, was first taken or enjoyed at any time prior to such period of thirty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated: and when such right, profit, or benefit, shall have been so taken and enjoyed as aforesaid, for the full period of sixty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was taken and enjoyed by some consent or agreement, expressly made or given for that purpose by deed or writing.”—Although a thirty years’ user, as of right and without interruption, cannot be defeated by showing *only* that it commenced at an antecedent period, yet the commencement of the user may be shown to have been at such a time (antecedent to the commencement of the thirty years) that the right could never have had a legal origin either by prescription or grant (*p*).

By sect. 4.—“Each of the respective periods of years hereinbefore mentioned shall be deemed and taken to be the period next before some suit or action wherein the claim or matter to which such period may relate shall have been or shall be brought into question; and no act or other matter shall be deemed to be an interruption, within the meaning of this statute, unless the same shall have been or shall be submitted to or acquiesced in for one year after the party interrupted shall have had or shall have notice thereof, and of the person making or authorizing the same to be made.”

Sect. 6 enacts.—“That in the several cases mentioned in and provided for by this act, no presumption shall be allowed or made in favour of any claim upon proof of the exercise or enjoyment of the right or matter claimed for any less period of time or number of years than for such period or number mentioned in this act, as may be applicable to the case and to the nature of the claim.”—“This provision is meant only to encounter presumptions, from an exercise of the right during such an imperfect period, that it was exercised in older times. The effect of this clause is, that a claim-

(n) See *Tickle v. Brown*, 4 A. & E. 369.

(o) See *Carr v. Foster*, *post*, p. 384.

(p) *Mill v. Commissioners of the New Forest*, 18 C. B. 60; see also *Attorney-General v. Mathias*, 27 L. J., Chan. 761.

ant, proving enjoyment for less than the specified time, shall not, on that ground, carry back his right to a period before that which his proof extends to" (q).

By the seventh section, the time during which any disability exists, *e.g.* infancy, non-compos, coverture, or tenancy for life (r) or during which any action shall have been pending, and diligently prosecuted (until abated by the death of any party (s)), shall be excluded in the computation of the periods (t), except only where the claim is declared to be absolute.

Under this statute a plea of enjoyment of right of common for thirty years before the commencement of the suit is sufficient, without saying for thirty years *next* before (u). "The 4th section of the statute is nothing but an exposition of the *proof* required to establish the right. It is a mere question of evidence; and if the plaintiff joins in the issue now offered, the defendant will not be able to get out of the proof of enjoyment of the right for thirty years next before action." *Per Tindal, C. J., S. C.* "That case (*Jones v. Price*) merely establishes that the averment of 'thirty years before the commencement of the suit,' means 'thirty years *next* before the commencement of the suit;' in other terms, that the omission of the word 'next' makes no difference.—Taking the 4th and 5th sections together, it is clear that an averment of enjoyment for thirty years next before *the times when, &c.*, is not in conformity with the act. The period mentioned in the act is thirty years next before some suit or action in which the claim shall be brought into question. Generally speaking, that would be next before the commencement of the suit in which the pleading takes place; at all events it is not next before the times when, &c." (x). Such an enjoyment, *viz.*, for the prescribed number of years before the act complained of, "gives an inchoate title, which may become complete or not by an enjoyment subsequent, according as that enjoyment is or is not continued to the commencement of the suit" (y).

Before the passing of this act, a prescriptive claim was a claim of immemorial right; the evidence of it was such as a party might be able to give in such a case; and the jury were to draw their inference from such proof as could be produced. Now, the burden of establishing an immemorial right is withdrawn, and the proof is limited to a thirty years' enjoyment, but that enjoyment must be proved to the full extent; therefore proof of a thirty years' enjoyment of common of pasture is not complete, if proof be given of an enjoyment for twenty-eight years immediately preceding an action

(q) *Per Lord Denman, C. J., in Carr v. Foster*, 3 Q. B. 587.

(r) *Clayton v. Corby*, 2 Q. B. 813.

(s) By the Com. Law Proc. Act, 1852, s. 135, actions no longer abate by the death of the parties thereto.

(t) *Clayton v. Corby*, 2 Q. B. 813.

(u) *Jones v. Price*, 3 B. N. C. 52.

(x) *Per Lord Denman, C. J., Richards v. Fry*, 7 A. & E. 698.

(y) *Per Parke, B., Ward v. Robins*, 15 M. & W. 237.

in which the right is disputed, and it appear that twenty-eight years back the enjoyment was interrupted, but that the right was exercised before the interruption: and the party disputing the right is not bound to show that such interruption was adverse; it lies upon the party prescribing, under the statute, to prove thirty years' uninterrupted enjoyment (*z*). But it is not necessary in cases of tenancies for life, &c., under sect. 7, to prove that the *whole* time of enjoyment *immediately* preceded the action. It is sufficient if the enjoyment previous to the tenancy for life, &c., and subsequently, up to the commencement of the suit, make up the prescribed period (*a*). This, however, must be specially replied (*b*).

The "interruption" which defeats a prescriptive right under this statute is an adverse obstruction, not a mere discontinuance of user by the claimant. Hence, in a case under sect. 1, where a commoner had ceased to use the common during two *intermediate* years of the thirty, having no commonable cattle at the time, but had used it before and after; it was held to be a question for the jury whether the right had ceased, or was still substantially enjoyed, and that they were justified from such evidence in finding a continued enjoyment of the right during thirty years (*c*). There must, however, be an actual enjoyment during the *first* (*d*) and *last* years of the prescribed time (*e*); and although, when once the enjoyment as of right has begun, no interruption, unless acquiesced in for more than a year, will defeat the right (*f*), yet interruptions, although not so acquiesced in, may show that such enjoyment never was of right, but contentious throughout (*g*).

A plea of right of common under the above statute is a plea of *user*, and therein differs from a plea of immemorial prescription, for a right claimed by user can only be co-extensive with the user, and is therefore divisible, but rights claimed by prescription are in their nature entire. Where, therefore, to an action of trespass *qu. cl. fr.*, the defendant pleaded a right of common of pasture by thirty years' user over a close which contained 3000 acres, but the plaintiff proved that the particular part of the close on which the trespass was committed had been inclosed, and the inclosure acquiesced in, for more than a year, the plaintiff was held to be entitled to a verdict (*h*).

By sect. 5,—“In all actions upon the case, and other pleadings, wherein the party claiming may now by law allege his right

(*z*) *Bailey v. Appleyard*, 8 A. & E. 161.

(*a*) *Clayton v. Corby*, 2 Q. B. 813.

(*b*) *Pye v. Mumford*, 11 Q. B. 666.

(*c*) *Carr v. Foster*, 3 Q. B. 581.

(*d*) But see *Lawson v. Langley*, 4 A. & E. 890; *Hall v. Swift*, 4 B. N. C. 381.

(*e*) *Lowe v. Carpenter*, 6 Exch. 825,

where, *semble*, per Parke, B., that the right should be exercised once a year at least.

(*f*) *Flight v. Thomas*, 8 Cl. & F. 231.

(*g*) *Eaton v. Swansea Waterworks Co.*, 17 Q. B. 267.

(*h*) *Davies v. Williams*, 16 Q. B. 546. See *Peardon v. Underhill*, *ibid.* 120.

generally, without averring the existence of such right from time immemorial, such general allegation shall still be deemed sufficient; and if the same shall be denied, all and every the matters in this act mentioned and provided, which shall be applicable to the case, shall be admissible in evidence to sustain or rebut such allegation; and in all pleadings to actions of trespass, and in all other pleadings wherein, before the passing this act [1st August, 1832] it would have been necessary to allege the right to have existed from time immemorial, it shall be sufficient to allege the enjoyment thereof *as of right, by the occupiers of the tenement in respect whereof the same is claimed (i)*, for and during such of the periods mentioned in this act as may be applicable to the case, and without claiming in the name or right of the owner of the fee, as is now usually done; and if the other party shall intend to rely on any proviso, exception, incapacity, disability, contract, agreement, or other matter hereinbefore mentioned, or on any cause or matter of fact or of law, not inconsistent with the simple fact of enjoyment" (*e.g.* a tenancy for life during part of the period (*k*)), "the same shall be specially alleged and set forth in answer to the allegation of the party claiming, and shall not be received in evidence on any general traverse or denial of such allegation."

A plea under the statute must state that the enjoyment was had "as of right" (*l*). A plea which omitted this statement, although it stated that the defendant "had used and actually enjoyed, &c., and still of right ought to have, use, &c.," was held bad after verdict. Where A. was seised in fee of a farm, which he occupied by his tenants, and was tenant for life of a moor, which he occupied himself, and the tenants of the farm had for more than sixty years depastured their cattle on the moor without interruption; it was held, that such user could not be *as of right* within the statute, for that the right of the tenants of the farm over the moor was derived from A., who could grant or withhold it at pleasure; and as he could not have an enjoyment as of right against himself, so neither could his tenants (*m*). Evidence that, during the alleged enjoyment, the estates over which and in right of which it has been exercised were held by the same person, disproves enjoyment as of right; and such unity of possession need not be pleaded, but may be given in evidence under a traverse of the enjoyment as of right (*n*).

(i) These words have given rise to a question whether rights of common in gross are within the statute. See *Welcome v. Upton*, 5 M. & W. 404; 6 M. & W. 543; *Bailey v. Stephenson*, 12 C. B. (N. S.) 113; Gale on Easements, pp.

10—13, 152.

(k) *Pye v. Mumford*, 11 Q. B. 666.

(l) *Holford v. Hankinson*, 5 Q. B. 584.

(m) *Warburton v. Parke*, 2 H. & N. 64.

(n) *Clayton v. Corby*, 2 Q. B. 813.

VIII. *Evidence.*

To a declaration in trespass for breaking and entering two closes of the plaintiff, the defendant pleaded that the said closes were, from time immemorial, parcels of a waste, and that he, the defendant, had a prescriptive right of common in the waste ; and because the closes were wrongfully separated from the residue of the waste, he broke down the gates. Replication, that the said closes were not wrongfully separated from the residue of the waste, but continually for twenty years and more, and before the first time when, &c., had been and were separated and divided, and inclosed from the residue of the waste, and occupied and enjoyed during that time in severalty. Issue thereon. It was held, that the allegation in the replication, that "the said closes had been inclosed from the residue of the waste, and enjoyed in severalty," was divisible, and satisfied by proof that any part of the closes in which the trespasses were committed had been so inclosed for that period, and that the plaintiff might therefore recover *pro tanto* (o). By the Common Law Procedure Act, 1852, sect. 75, it is provided, that *all* pleadings "capable of being construed distributively shall be taken distributively, and if issue is taken thereon, and so much thereof as shall be sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered."

A plaintiff in trespass was the occupier of a farm, called Tyr Adam, situate within a manor adjoining a mountain, and claimed to be exclusive owner of that part of the mountain next adjoining his farm. The question being, whether he was exclusive owner of the soil, or had a right of common only over that part of the mountain, the defendant, in order to show that the plaintiff had not the right of soil, produced from the rolls of the manor an instrument, purporting to be a presentment in the year 1759, wherein the jurors, after reciting that they were sworn to view such part of the waste land as lieth within the lordship, as was claimed by A. B. to belong to his tenement called Tyr Adam, upon their oaths said, that they had considered the claim and the evidence, and presented that all the said lands within the said boundaries were part and parcel of the common called K., and that neither the said A. B., nor the tenants or occupiers of the tenement called Tyr Adam, had any right to the same, or any greater right than such as the other freehold tenants of the lordship had for their commonable cattle. It was held, that this instrument was not admissible in evidence ; first, not as a presentment, because the homage had no right to

decide the claim made by an individual to the freehold (*p*) ; nor as an award, because there was no mutual submission, either express or implied ; nor as evidence of reputation, because it was on the face of it made *post litem motam* (*q*).

Levancy and Couchancy.—Trespass for entering plaintiff's close with cows and sheep, and destroying his grass. As to the cows, defendant prescribed for common, for all cattle (except sheep) *levant and couchant* on defendant's messuage, and one acre of land ; the issue was on the levancy and couchancy. The evidence was, that defendant was seised of a copyhold messuage, and one acre of pasture land ; that he foddered eight or nine cows in the yard of the said messuage with hay brought from another farm about two miles off. Lord *Raymond*, C. J. : "These cows cannot be levant and couchant upon the one acre ; for I am clear that levancy and couchancy is a *stint of common in contradistinction to common sans nombre*, and signifies only so many as the messuage or farm will by its produce maintain ; and it was so resolved in the case of the town of Derby (*r*). I know there are cases which say, that foddering in a yard makes a levancy and couchancy, but then the meaning is, foddering with stubble, &c. produced from the messuage or land itself, to which the yard belongs ; for example, if an acre of land will produce only so much hay, &c. as will maintain but one cow, the occupier shall not put two on the common, because he foddered them in the yard with the produce of other land ; for, by the same rule, he might put 1,000 of his own, or of other persons, and deprive the other commoners of the benefit of common" (*s*).

Trespass for impounding plaintiff's colt and three fillies. Defendant set out his right to a messuage, with the appurtenants, to which the defendant had a right of common belonging to the *loc. in quo*, and that defendant took the cattle damage feasant ; plaintiff replies, that he is possessed of a copyhold messuage in Drayton, and prescribes for a right of common in the *loc. in quo*, for all commonable cattle, levant and couchant, on the said messuage, at all times of the year. Defendant traverses the levancy and couchancy of the beasts taken, and issue thereon. It appeared by the evidence, that the plaintiff's messuage was only a yard where the horses were foddered, and one acre of orchard, with the produce of which the plaintiff could not maintain the colt and three fillies, and for that reason he foddered them with hay and straw from other land hired by him ; *per Lee*, C. J. : "These beasts cannot be levant and couchant on this yard, though they are foddered there,

(*p*) See *Daniel v. Wilkin*, 7 Exch. 429.

(*q*) *Richards v. Bassett*, 10 B. & C. 657.

(*r*) *Mellor v. Spateman*, 1 Wms. Saund. 343.

(*s*) *Rogers v. Benstead*, Cambr. Sum. Ass. 1727, cor. Lord *Raymond*, C. J., MS. Serjt. Leeds ; quoted by *Bayley*, J., in *Cheesman v. Hardham*, 1 B. & Ald. 711.

unless they can be foddered with the produce of the messuage; and so it was determined by Lord *Raymond*, in *Rogers v. Benstead*, at Cambridge, 1727, after much consideration, that levancy and couchancy signify what the produce of the estate will bear, and is a stint of common with respect to other commoners; and I know no difference as to this, whether the common is for the whole year, or for half a year only" (t). "The rule now is, that such cattle only are to be holden levant and couchant upon the inclosed land, as that land will keep during the winter. It has been argued, that the rule includes such as the land will keep during the whole or any part of the year; but that is not so: the real question is, has this defendant turned more cattle on the common than the winter eatage of his ancient tenement, together with the hay and produce obtained from it during the summer, is capable of maintaining" (u). A right of common appurtenant for cattle levant and couchant proved by acts of user for thirty years, and exercised in respect of a tenement formerly in a condition to support cattle, but now, and for more than thirty years past, turned to different purposes, is not extinguished or suspended by reason of such change in the condition of the tenement, if the tenement is still in such a state that it might easily be turned to the purposes of feeding cattle, for levancy and couchancy is rather a measure of the capacity of the land, if applied to the purpose of maintaining cattle, than a condition to be literally complied with, as necessary to the right, by the cattle lying down and getting up on the land, or by their being actually sustained by the fruit thereof (x).

(t) *Fulcher v. Scales*, Norfolk Summ. Ass. 1738, MS. Serjt. Leeds.
 (u) *Per Parke, B.*, in *Whitlock v.*

Hutchinson, 2 M. & Rob. 205.
 (x) *Carr v. Lambert*, L. R. 1, Ex. 168 in error; 35 L. J., Ex. 121.

CHAPTER XII.

COSTS, CERTIFICATE FOR.

I. *In Actions founded on Contract.*

IF in such actions the plaintiff recovers 20*l.* or less ("a sum not exceeding twenty pounds") he will not be entitled to his costs unless he obtains either, 1st, a certificate from the judge, sometime before the taxation of costs (*a*), that there was a sufficient reason for bringing such action in such superior court (*b*); or, 2nd, a rule or order of the court, or a judge at chambers (*c*), within a reasonable time (*d*), allowing such costs.

It is to be observed that if the plaintiff in such actions, except such as concern the title or freehold of land, recovers *less than 40s.*, the judge who tries the cause may in the case of a frivolous action, within a reasonable time, which is generally any time before final judgment is signed (*e*), certify to *deprive* the plaintiff of his costs under the 43 Eliz. c. 6, s. 2; this statute being unrepealed in respect of such actions. Whether or not it will be practically obsolete will depend upon the interpretation that is given to section 5 of the County Court Act of 1867. This statute of Elizabeth gives neither the sheriff nor the court power to deprive the plaintiff of his costs in an action tried upon a writ of enquiry before the sheriff (*f*).

II. *In Actions founded on Tort (g).*

(1) If in such actions the plaintiff recovers *from 10*l.* to 40*s.*, both inclusive*, he will not be entitled to his costs unless he obtains either, 1st, a certificate from the judge, sometime before the taxation of costs, that there was a sufficient reason for bringing such

(*a*) *Bennett v. Thompson*, 6 E. & B. 683; 25 L. J., Q. B. 378; *Tharrall v. Trevor*, 6 Exch. 187.

(*b*) 30 & 31 Vict. c. 142, s. 5.

(*c*) *Ibid.*

(*d*) *Reed v. Gordon*, 8 Exch. 653.

(*e*) *Lyons v. Hyman*, 20 L. J., Ex. 25; 1 L. M. & P. 60; *Foxall v. Banks*, 5 B. & Ald. 536; *Davis v. Cole*, 6 M. & W. 624.

(*f*) *Story v. Hodson*, 5 D. P. C. 558; *Batchelor v. Dudley*, 2 M. & G. 333;

Wardroper v. Richardson, 1 A. & E. 75; *Jones v. Bond*, 5 D. P. C. 455.

(*g*) There appears to be some doubt whether detainee is really founded on contract or on tort, see *Danby v. Lamb*, 11 C. B. (N. S.) 423; but in reference to this subject, it would seem to belong to actions founded on contract, with which it was always classed in the repealed sections of the earlier County Court Acts that related to costs.

action in such superior court; or, 2nd, a rule or order of the court, or a judge at chambers, within a reasonable time, allowing such costs (*h*).

(2) If in such actions (except in the case of slander for words actionable *per se*) the plaintiff recovers by the verdict *less than* 40s. he will not be entitled to his costs unless, besides the certificate or order as last above-mentioned, he also obtains from the judge before whom the verdict was obtained, immediately afterwards (*i*), a certificate, under the 3 & 4 Vict. c. 24, s. 2, that the action was brought to try a right besides the mere right to damages, or that the trespass was wilful and *malicious* (*k*), unless the action was brought for a trespass to lands after notice, when, if the judge has not certified, plaintiff may enter a suggestion on the roll, and then the certificate under s. 2 will not be required (*l*).

In the excepted case of slander for words actionable *per se*, even if a judge were to certify as above the plaintiff could only obtain as much costs as damages, on account of the statute 21 Jac. I. c. 16, s. 6 (*m*).

The following are the sections of the most important statutes relating to the subject.

The statute of Gloucester, 6 Edw. I. c. 1, s. 2: "That the demandant may recover against the tenant the costs of his writ purchased together with the damages above said. And this act shall hold place in all cases where the party is to recover damages."

The 43 Eliz. c. 6: "For avoiding the infinite number of small and trifling suits, &c. be it enacted:" s. 2. "If upon any action personal, to be brought in any of her Majesty's Courts at Westminster, not being for any title or interest of lands, nor concerning the freehold or inheritance of any lands, nor for any battery, it shall appear to the judges of the same court, and so signified or set down by the justices before whom the same shall be tried, that the debt or damages to be recovered therein in the same court shall not amount to the sum of forty shillings or above, that in every such case the judges and justices before whom any such action shall be pursued shall not award for costs to the party plaintiff

(*h*) See notes (*a*), (*b*), (*d*), *supra*.

(*i*) *i. e.*, "within such reasonable time as will exclude the danger of intervening facts operating upon the mind of the judge so as to disturb the impression made upon it by the evidence in the cause." *Per* Lord Abinger, C. B., *Thompson v. Gibson*, 8 M. & W. 287. See *Jones v. Williams*, 12 M. & W. 420.

(*k*) In actions on the case for libel the word "malicious" in this section cannot be satisfied, except by conduct amount-

ing to "personal malice," *Foster v. Pointer*, 8 M. & W. 395. In actions of trespass, the word may be satisfied by violence and outrage; and also (*Sherwin v. Swindell*, 12 M. & W. 283), by the circumstance of having been done without authority and after notice.

(*l*) 3 & 4 Vict. c. 24, s. 3. *Daw v. Hole*, 15 L. J., Q. B. 191; *Bowyer v. Cook*, 4 C. B. 248.

(*m*) *Foster v. Pointer*, 8 M. & W. 395.

any greater or more costs than the sum of the debt or damages so recovered shall amount unto, but less at their discretions."

The 3 & 4 Vict. c. 24, s. 1, repeals the act of 43 Eliz. "so far as it relates to costs in actions of trespass or trespass on the case."

The 21 Jac. I. c. 16, s. 6: "That in all actions upon the case for slanderous words to be sued or prosecuted by any person or persons in any of the courts of record at Westminster, or in any courts whatsoever that hath power to hold plea of the same, if the jury upon the trial of the issue in such action, or the jury that shall inquire of the damages, do find or assess the damages under forty shillings, then the plaintiff or plaintiffs in such action shall have and recover only so much costs as the damages so given or assessed amount unto, without any further increase of the same, any law, statute, custom, or usage, to the contrary in any-wise notwithstanding."

The 3 & 4 Vict. c. 24, s. 2: "That if the plaintiff in any action of trespass or of trespass on the case, brought or to be brought in any of her Majesty's Courts at Westminster, or in the Court of Common Pleas at Lancaster, or in the Court of Common Pleas at Durham, shall recover by the verdict of a jury less damages than 40s., such plaintiff shall not be entitled to recover or obtain from the defendant in respect of such verdict any costs whatever, whether it shall be given upon any issue or issues tried, or judgment shall have passed by default, unless the judge or presiding officer before whom such verdict shall be obtained, shall immediately afterwards certify on the back of the record, or on the writ of trial, or writ of inquiry, that the action was really brought to try a right, besides the mere right to recover damages, for the trespass or grievance for which the action shall have been brought, or that the trespass or grievance in respect of which the action was brought was wilful and malicious."

The 8 & 9 Will. III. c. 11, s. 1: "For relief of his majesty's good subjects against causeless and unjust suits, and for the better enabling them to recover their just rights, be it enacted, that from and after the five-and-twentieth day of March which shall be in the year of our Lord 1697, where several persons shall be made defendants to any action or plaint of trespass, assault, false imprisonment, or ejection firmæ, and any one or more of them shall be upon the trial thereof acquitted by verdict, every person or persons so acquitted shall have and recover his costs of suit in like manner as if a verdict had been given against the plaintiff or plaintiffs and acquitted all the defendants, unless the judge before whom such cause shall be tried shall immediately after the trial thereof, in open court, certify upon the record under his hand that there was a reasonable cause for the making such person or persons a defendant or defendants to such action or plaint."

The 3 & 4 Will. IV. c. 42, s. 32: "When several persons shall

be made defendants in any personal action, and any one or more of them shall have a *nolle prosequi* entered as to him or them, or upon the trial shall have a verdict pass for him or them, every such person shall have judgment for and recover his reasonable costs, unless in the case of a trial the judge before whom the cause shall be tried shall certify upon the record under his hand that there was a reasonable cause for making such person a defendant in such action."

The following are the sections of the acts giving common law jurisdiction to the county courts.

The 9 & 10 Vict. c. 95, s. 58: "All pleas of personal actions when the debt or damage claimed is not more than 20*l.* (extended to 50*l.* by 13 & 14 Vict. c. 61, s. 1), whether on balance of account or otherwise (*n*), may be holden in the county court without writ; and all such actions brought in the said court shall be heard and determined in a summary way in a court constituted under this act, and according to the provisions of this act: provided always that the court shall not have cognizance of any action of ejectment, or in which the title to any corporeal or incorporeal hereditaments, or to any toll, fair, market, or franchise, shall be in question, or in which the validity of any devise, bequest, or limitation, under any will or settlement may be disputed, or for any malicious prosecution, or for any libel or slander, or for criminal conversation, or for seduction or breach of promise of marriage."

The 19 & 20 Vict. c. 108, s. 18: "When a plaintiff shall dwell or carry on business in the district of the Bloomsbury county court of Middlesex, or in the district of the Brompton county court of Middlesex, or in the district of the Clerkenwell county court of Middlesex, or in the district of the Lambeth county court of Surrey, or in the district of the Marylebone county court of Middlesex, or in the district of the Shoreditch county court of Middlesex, or in the district of the Southwark county court of Surrey, or in the district of the Whitechapel county court of Middlesex, and the defendant shall dwell or carry on business in the district of any of the said courts, the summons may issue, and be served, either in the district in which the plaintiff shall dwell or carry on business, or in the district in which the defendant shall dwell or carry on business."

Sect. 23: "The county courts shall not have jurisdiction to try any action for criminal conversation, but with respect to all other actions which may be brought in any superior courts of common law, if both parties shall agree, by a memorandum signed by them or their respective attorneys, that any county court named in such

(*n*) A demand exceeding 50*l.*, and reduced after a disputed set-off to a sum not exceeding 50*l.*, is not within the jurisdiction, *Avard v. Rhodes*, 8 Exch.

312; nor can a plaintiff give jurisdiction by offering to abandon, except at the trial.

memorandum shall have power to try such action, such county court shall have jurisdiction to try the same."

Sect. 24: "When in any action the debt or demand claimed consists of a balance not exceeding fifty pounds, after an admitted set off of any debt or demand claimed or recoverable by the defendant from the plaintiff, the court shall have jurisdiction to try such action."

Sect 25: "In any action in the county court in which the title to any corporeal or incorporeal hereditament, or to any toll, fair, market, or franchise, shall incidentally come in question, the judge shall have power to decide the claim which it is the immediate object of the action to enforce, if both parties at the hearing shall consent in any writing, signed by them or their attorneys, to the judge having such power."

Sect. 27: "No action shall be brought in a county court on any judgment of a superior court."

The 30 & 31 Vict. c. 142, s. 1: "A plaint may be entered in the county court within the district of which the defendant, or one of the defendants, shall dwell or carry on his business at the time of bringing the action or suit; or it may be entered, by leave of the judge or registrar, in the county court within the district of which the defendant, or one of the defendants, dwelt or carried on business at any time within six calendar months next before the time of action or suit brought; or, with the like leave, in the county court in the district of which the cause of action or suit wholly or in part arose."

Sect. 3: "Where an action is brought in any of the county courts (o), mentioned in the section numbered eighteen of the act passed in the session of parliament, holden in the nineteenth and twentieth years of the reign of her Majesty, chapter one hundred and eight, all subsequent proceedings in such action shall be taken and had in such court, if the party against whom the proceeding is taken or had shall reside or carry on business within the district of any of such courts, or within the city of London. An action may be commenced, and all subsequent proceedings taken and had, in the court held under the provisions of 'The London (city) Small Debts Extension Act, 1852,' by a plaintiff residing or carrying on business within the city of London, against a defendant who resides or carries on business within the district of any of such courts; and an action may be commenced, and all subsequent proceedings taken and had, in any of such county courts, by a plaintiff residing or carrying on business within the district of any such county court, against a defendant who resides or carries on business within the city of London."

(o) This refers to the metropolitan courts.

Sect. 4: "No action shall henceforth be brought, or be maintainable in any court, to recover any debt or sum of money alleged to be due in respect of the sale of any ale, porter, beer, cider, or perry, which, after this act, was consumed on the premises when sold or supplied; or in respect of any money or goods lent or supplied, or of any security given for, in, or towards, the obtaining of any such ale, porter, beer, cider, or perry."

Sect. 5: "If in any action, commenced after the passing of this act, in any of her Majesty's superior courts of record, the plaintiff shall recover a sum not exceeding twenty pounds, if the action is founded on contract, or ten pounds if founded on tort, whether by verdict, judgment by default, or on demurrer, or otherwise, he shall not be entitled to any costs of suit, unless the judge certify on the record that there was sufficient reason for bringing such action in such superior court, or unless the court, or a judge at chambers, shall by rule or order allow such costs."

Sect. 7: "Where in any action of contract, brought or commenced in any of her Majesty's superior courts of common law, the claim endorsed on the writ does not exceed fifty pounds, or where such claim, though it originally exceeded fifty pounds, is reduced by payment, an admitted set-off, or otherwise, to a sum not exceeding fifty pounds, it shall be lawful for the defendant in the action, within eight days from the day upon which the writ shall have been served upon him, if the whole or part of the demand of the plaintiff be contested, to apply to a judge at chambers for a summons to the plaintiff to show cause why such action should not be tried in the county court, or one of the county courts, in which the action might have been commenced; and on the hearing of such summons the judge shall, unless there be good cause to the contrary, order such action to be tried accordingly, and thereupon the plaintiff shall lodge the original writ and the order with the registrar of the county court mentioned in the order, who shall appoint a day for the hearing of the cause, notice whereof shall be sent by post or otherwise by the registrar to both parties, or their attorneys, and the cause, and all proceedings therein, shall be heard and taken in such county court as if the action had been originally commenced in such county court; and the costs of the parties, in respect of proceedings subsequent to the order of the judge of the superior court, shall be allowed according to the scale of costs in use in the county courts; and the costs of the proceedings previously had in the superior court shall be allowed according to the scale in use in such latter court."

Sect. 10: "It shall be lawful for any person against whom an action for malicious prosecution, illegal arrest, illegal distress, assault, false imprisonment, libel, slander, seduction, or other action of tort, may be brought in a superior court, to make an affidavit that the plaintiff has no visible means of paying the

costs of the defendant, should a verdict be not found for the plaintiff; and thereupon, a judge of the court in which the action is brought shall have power to make an order that, unless the plaintiff shall, within a time to be therein mentioned, give full security for the defendant's costs, to the satisfaction of one of the masters of the said court, or satisfy the judge that he has a cause of action fit to be prosecuted in the superior court, all proceedings in the action shall be stayed; or in the event of the plaintiff being unable or unwilling to give such security, or failing to satisfy the judge as aforesaid, that the cause be remitted for trial before a county court, to be therein named, &c."

Sect. 11: "All actions of ejectment where neither the value of the lands, tenements, or hereditaments, nor the rent payable in respect thereof shall exceed the sum of twenty pounds by the year, may be brought and prosecuted in the county court of the district in which the lands, tenements, or hereditaments are situate."

Sect. 12: "The county courts shall have jurisdiction to try any action in which the title to any corporeal or incorporeal hereditaments shall come in question, where neither the value of the lands, tenements, or hereditaments in dispute, nor the rent payable in respect thereof shall exceed the sum of twenty pounds by the year, or in case of an easement or licence, where neither the value nor reserved rent of the lands, tenements, or hereditaments, in respect of which the easement or licence is claimed, or on, through, over, or under which such easement or licence is claimed, shall exceed the sum of twenty pounds by the year: provided that the defendant in any such action of ejectment, or his landlord, may within one month from the day of service of the writ, apply to a judge at chambers for a summons to the plaintiff to show cause why such action should not be tried in one of the superior courts, on the ground that the title to lands or hereditaments, of greater annual value than twenty pounds, would be affected by the decision in such action; and on the hearing of such summons the judge, if satisfied that the title to other lands would be so affected, may order such action to be tried in one of the superior courts, and thereupon all proceedings in the county court in such action shall be discontinued."

Sect. 14: "Whenever an action or suit is brought in a county court, which the court has no jurisdiction to try, the judge shall order the cause to be struck out, and shall, unless the parties consent to the court having jurisdiction to try the same, have power to award costs in the same manner, to the same extent, and recoverable in the same manner, as if the court had jurisdiction in the matter of such plaint, and the plaintiff had not appeared, or had appeared and failed to prove his demand."

Sect. 29: "When any action or suit shall be brought in any other court than the superior courts of law, which could have been

brought in a county court, and the verdict recovered is for a less sum than ten pounds, the plaintiff shall not recover from the defendant a greater amount of costs than he would have been allowed if the action or suit had been brought in such county court, unless the judge shall certify that the action or suit was a fit one to be brought in such other court."

Sect. 35: "The words 'County Court,' when used in this act, or in any future act, shall mean and include the courts held by virtue of 'The London (city) Small Debts Extension Act, 1852,' unless otherwise provided; and such courts shall be holden by the name of 'The City of London Court,' and shall be a court of record; and its decisions shall be subject to appeal in the same way, and on the same conditions, as the decisions of a county court are subject for the time being, &c., &c."

By sect. 34, this act and the other county courts acts (except as to the provisions repealed) are to be construed together. The sections (2 & 39) of "The London Small Debts Act" which define the jurisdiction of the sheriffs' courts, are nearly word for word the same as the sections (9 & 10 Vict. c. 95, s. 58; 30 & 31 Vict. c. 142, s. 1) which define the jurisdiction of the county courts.

Most of the above sections have no direct bearing upon the question of certificate of costs. As, however, under sect. 5 of the County Court Act of 1867, the superior courts seem to have conferred upon them an equitable jurisdiction in the question of costs in all cases tried in them, where the verdict is for 20*l.* or less in contract, and for 10*l.* or less in tort, their consideration is necessary for the purpose of seeing what course either party had open to him other than that which he has followed.

Certificate for Costs of Special Jury.

By 6 Geo. IV. c. 50, s. 34, the costs occasioned by the special jury fall on the party applying for it, "unless the judge before whom the cause is tried shall, *immediately* (*p*) after the verdict, certify under his hand, upon the back of the record, that the same was a cause proper to be tried by a special jury."

(*p*) *i. e.*, within a reasonable time, *Christie v. Richardson*, 10 M. & W. 688.

CHAPTER XIII.

COVENANT.

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I. *Of the Action for Breach of Covenant.*

COVENANTS are of two kinds: 1. Express. 2. Implied, or covenants in law. An express covenant is an agreement entered into by deed indented or deed poll, between two or more persons, for the performance of certain acts, or for the forbearance to do certain acts. An implied covenant, or covenant in law, is an agreement raised by implication of law between two or more persons in a deed indented or deed poll, from certain technical expressions used therein. For the violation of agreements of this kind the law has provided a remedy by action of covenant, wherein the party injured may recover damages in proportion to the loss sustained. Where it is necessary to enforce the actual performance of any agreement, *e. g.* the conveyance of land, execution of deeds, &c., application must be made to a court of equity for what is termed a specific performance; for in the action of covenant damages only for the non-performance can be recovered. If the performance of a public or *quasi* public duty be necessary, an action of mandamus, under Common Law Procedure Act, 1854, s. 68, will lie (*a*).

A party bringing covenant on a deed poll must be named therein; for where, upon the face of the deed poll, it appeared, that the defendant promised to do a certain act, without saying that he promised the plaintiff, it was held that an action would not lie (*b*). Covenant lies for rent reserved by indenture, and accruing before a re-entry for a forfeiture, notwithstanding the lessor has re-entered, and under such re-entry is to have the premises again, "as if the indenture had never been made;" or, in other words, re-entry for breach of covenant is no bar to covenant for rent accrued before the re-entry (*c*). So an assignee of a lease is liable for the breach of a covenant running with the land incurred in his own time, although the action is not commenced until after he has assigned over the premises (*d*). Where in covenant for the further yearly rent stipulated for in case of converting pasture into tillage, the defendant pleaded, that the plaintiff accepted the original rent, as

(*a*) *Fatherby v. Metropolitan Railway Company*, 2 L. R., C. P. 188.

(*b*) *Green v. Horne*, Salk. 197.

(*c*) *Hartshorne v. Watson*, 4 B. N. C. 178.

(*d*) *Harley v. King*, 1 C. M. & R. 18.

and for the rent due, without demanding the additional rent; it was held, that the right of the plaintiff to recover a sum of money, as stipulated damages and as additional rent, was not waived by receiving the sum due for the original rent; *aliter*, if it were a forfeiture (*e*).

If A. promises, by deed, not to do a certain act, an action of covenant may be maintained, for the breach of such promise; but an action on the case will not lie. As where A. recovered a debt of 7*l.* 10*s.* against B., and B. paid A. 7*l.*, whereupon A. by deed released all actions, executions, &c. to B., and in the same deed promised to discharge all executions against B. upon the same judgment, but afterwards sued out execution thereon: the court were of opinion, that the promise being by deed, B.'s remedy was by an action of covenant, and not *assumpsit* (*f*). The defendants, by deed of 18th April, 1838, contracted to employ the plaintiff in the management of certain chemical works for the term of seven years, from the 30th of June then next, with a proviso, that if a certain process on which the plaintiff was then engaged should not be in operation on the 21st of June, then the defendants should after that day have power to determine the contract by notice in writing. On the 9th of August a second agreement in writing, not under seal, was entered into between the parties, whereby the time for bringing the process into operation was extended to 21st of December, 1838. The plaintiff having brought *assumpsit* upon the second agreement, for a breach of stipulations contained in the deed; it was held, that the action could not be maintained, the second agreement being merely an agreement for the extension of the time mentioned in the deed, and not an agreement incorporating that deed, which was still in force (*g*).

Where Assumpsit will lie though there be a Deed.—Although it is a general rule that *assumpsit* will not lie where there is a remedy of a higher nature (*h*) co-extensive with the contract declared on (*i*), yet there are some exceptions to this rule; as where two persons entered into articles of partnership for a term of years, and the deed contained a covenant to account yearly, and to adjust and make a final settlement at the expiration of the partnership; and they dissolved the partnership before the years were expired, and accounted together, and struck a balance, which was in favour of the plaintiff, including several items not connected with the partnership, and the defendant promised to pay it: it was held, that *assumpsit* would lie on such express promise (*j*). And *Buller*,

(*e*) *Denton v. Richmond*, 1 C. & M. 734.

(*f*) *Bennus v. Guylldley*, Cro. Jac. 505.

(*g*) *Gwynne v. Davy*, 1 M. & G. 857.

(*h*) *Shack v. Anthony*, 1 M. & S. 573; *Baber v. Harris*, 9 A. & E. 532.

(*i*) *Per Tindal, C. J., Filmer v. Burnby*, 2 M. & G. 529; *Ansell v. Baker*, 15 Q. B. 20.

(*j*) An express promise is not however necessary; *per Parke, B., Wray v. Milestone*, 5 M. & W. 24.

J., observed, that if no other articles had been introduced into the account, but those relating to the partnership, he should still have been of opinion, that *assumpsit* might have been maintained; for the question then would have been, whether a previous partnership being dissolved, and an account settled, was or was not in point of law a sufficient consideration for a (new and independent) promise. He had no difficulty in saying, that it was (*j*). But it is otherwise if the payment of the money is secured by a deed, and a balance is struck merely to ascertain the amount due under it (*k*). A stronger exception, however, to the general rule above mentioned will be found in the case of *Nurse v. Craig* (*l*).

In *Burnett v. Lynch* (*m*), it was held, that *case* (not covenant) lay by the assignor against the assignee of a lease assigned by deed poll, upon his implied duty to perform the covenant in the original lease, although the assignor had, by the assignment, parted with all his interest; and that, although *assumpsit* might lie, *case* was the better form of action for the injury sustained by the assignor, in consequence of the assignee's breaches of covenant. "That *case* (of *Burnett v. Lynch*) proceeds upon the ground that during the continuance of the interest of the assignee there is a duty on his part to pay the rent and perform the covenants.—The effect of the assignment is, that the (original) lessee becomes surety to the lessor for the assignee, who, as between himself and the (original) lessor, is the principal, bound, whilst he is assignee, to pay the rent and perform the covenants running with the estate, and the surety, after paying the debt or discharging the obligation to which he is liable, has his remedy over against the principal" (*n*).

Where a plaintiff advanced money upon the security of a mortgage, which contained no covenant for the payment of money advanced by the plaintiff, but merely gave the plaintiff the security of the mortgaged premises: it was held, that, advance being made at the request of the defendants, raised a contract by parol for the repayment, which was not merged in a security of a higher nature, the mortgage, in such a case, being in the nature of a *collateral* security only (*o*). *Secus*, however, if there be a covenant to pay in the mortgage deed (*p*); whether such covenant be absolute, or only conditional, as by a trustee to pay out of any trust funds that might come to his hands (*q*); and, although a deed be intended as a security only for an existing debt, if it be made for the identical debt, and between the same parties, the remedy on the simple contract is taken away (*r*).

(*j*) *Foster v. Allanson*, 2 T. R. 479.

(*k*) *Middleditch v. Ellis*, 2 Exch. 623.

(*l*) 2 B. & P. 148.

(*m*) 5 B. & C. 589.

(*n*) *Per Lord Denman*, C. J., *Wolveridge v. Steward*, 1 C. & M. 644.

(*o*) *Yates v. Aston*, 4 Q. B. 196.

(*p*) *Middleditch v. Ellis*, 2 Exch. 623.

(*q*) *Matthew v. Blackmore*, 26 L. J., Exch. 150.

(*r*) *Price v. Moulton*, 10 C. B. 561.

II. *Of the Construction of Covenants.*

Covenants are to be construed according to the obvious intention of the parties, as collected from the whole context of the instrument, "*ex antecedentibus et consequentibus*, and according to the reasonable sense and construction of the words" (s). If there be any ambiguity, then such construction shall be made as is most strong against the covenantor (t); for he might have expressed himself more clearly. In like manner, where the words of the grant are doubtful, they are to be construed in favour of the grantee. This general principle has been applied to the construction of leases. Hence it has been held, that under a lease for fourteen or seven years, *the lessee only* has the option of determining it at the end of the first seven years (u).

It is immaterial in what part of a deed any particular covenant is inserted (x); for, in the construction of it, the whole deed must be taken into consideration, in order to discover the meaning of the parties; as where in a lease of a colliery, two lessees covenanted *jointly and severally in manner following*, viz. &c.—here followed a number of covenants in respect of the working of the colliery, wherein the lessees covenanted jointly and severally; then followed a covenant, that the monies appearing to be due should be accounted for and paid by the lessees, their executors, &c., not saying, "and each of them;" it was held, that the general words, at the beginning of the lease, "jointly and severally in the manner following," extended to all the subsequent covenants on the part of the lessees throughout the deed, there not being anything in the nature of the subject to restrain those words to the former part of the lease (y).

An ambiguous covenant may be controlled by the recitals (z), but not where there is no ambiguity. Thus, an absolute covenant not to do an act, will not be controlled by a recital from which it appears that the parties intended that such act might be done on payment of a fixed sum for liquidated damages (a).

In conformity with the rules before laid down for the construction of covenants, and in support of the apparent intention of the parties, covenants in large and general terms have been frequently narrowed and confined. As where A. leased a manor to B. for years, excepting all woods, great trees, timber trees, and underwood, &c., and covenanted with the lessee, that he might take fire-bote, *super dicta premissa*; it was held, that the lessee could not take fire-bote

(s) *Per Lord Ellenborough, C. J., Iggu'den v. May*, 7 East, 241.

(t) *Per Mansfield, C. J., Flint v. Brandon*, 1 N. R. 78.

(u) *Doe v. Dixon*, 9 East, 15.

(x) *Per Buller, J.*, 5 T. R. 526.

(y) *Duke of Northumberland v. Ward Errington*, 5 T. R. 522. See *Copland v. Laporte*, 3 A. & E. 517.

(z) *Selby v. The Crystal Palace District Gas Company*, 30 Beav. 606.

(a) *Bird v. Lake*, 1 H. & M. 111.

in a close of wood, parcel of the manor, because, by the exception of the wood, the soil thereof was excepted; and the words *super premissa* should be intended of such things only as were demised. It was admitted, however, that, by the covenant, the lessee was entitled to take the wood upon the other lands, for though the wood was excepted, yet the land was demised (b). So where the defendant sold to the plaintiff a lease for years of a manor, and entered into a bond, with a condition that *he* would not do, nor had done, any act to disturb the plaintiff, *but* that the plaintiff should hold and enjoy without the disturbance of the vendor, *or any other person*: it was held, that the condition was confined to acts done or to be done by the vendor only, for that the words subsequent to "but" were referrible to the previous sentence (c).

Where A., in consideration of a certain fine and yearly rent, demised land for twenty-one years, and covenanted, at the end of eighteen years of the term, or before, on request of the lessee, to grant a new lease of the premises "for the like fine, for the like term of twenty-one years, at the like yearly rent, with *all* covenants as in that indenture were contained;" it was held, that this covenant was satisfied by a tender of a new lease for twenty-one years, containing *all* the former covenants, *except* the covenant for future renewal (d).

The plaintiff declared upon an indenture, whereby the defendant demised to the plaintiff, for a term of years, certain parts of a messuage then lately parted off from the part occupied by the defendant, with certain easements belonging to the same, and a portion of an adjoining yard; and the defendant covenanted that he would permit the lessee (the plaintiff) to have the use of the pump in the said yard jointly with the defendant, *whilst the same should remain there*, paying half the expenses of keeping it in repair. The plaintiff assigned for breach, that, during the continuance of the lease, the defendant, without reasonable cause, and in order to injure the plaintiff, took away the pump, although the plaintiff was willing to have paid half the expenses of keeping the same in repair. On demurrer, it was held that the breach was ill assigned; for the use of the pump was not a specific subject of the demise (e); and by the introduction of the words, "*whilst the same should remain there*," it appeared that the lessor meant to reserve to himself the liberty of removing the pump from whatever capricious or unreasonable motive he might do so; and that it was not inconsistent with the stipulation, that the lessee should pay half

(b) *Cage v. Paxlin*, 1 Leon. 116, cited by Lord *Ellenborough*, C. J., 7 East, 241.

(c) *Broughton v. Conway*, Moore, 58; cited by Lord *Ellenborough*, C. J., in *Gale v. Reed*, 8 East, 89; and see *Smith v. Compton*, 3 B. & Ad. 199.

(d) *Iggulden v. May* (Exch. Chamb.), 2 N. R. 449.

(e) The demise of the use of a thing is the demise of the thing itself. *Pomfret v. Ricroft*, 1 Wms. Saund. 321.

the expenses of repair, whilst the pump remained on the demised premises (*f*).

Where a lessee of a house and garden for a term of years covenanted with the lessor not to use or exercise, or permit or suffer to be used or exercised, upon the demised premises, or any part thereof, any trade or business, &c., without the licence of the lessor, &c., and afterwards without the licence of the lessor assigned the lease to a schoolmaster, who carried on his business in the house and premises; it was held, that the assignment was a breach of this covenant (*g*). But where the covenant was not to exercise the particular trades or business specified, "or any offensive trade," it was held, that it was not a trade to use the house as a lunatic asylum: the word trade in this covenant being applicable only to a business conducted by buying and selling (*h*). Upon the sale of the goodwill of a drapery and hosiery business the vendor covenanted that he would not carry on or assist in the carrying on of a similar business within two miles; it was held, that this covenant was broken by vendor supplying from a place beyond the prescribed limits, goods to customers residing within the district at their solicitation (*i*). A covenant by a lessee of a theatre not to encumber is not broken by the giving of warrants of attorney to *bond fide* creditors, under which judgments (which by the 13th section of the 1 & 2 Vict. c. 110, are a charge on real property) are entered up (*k*). A covenant to pay as purchase money for property a certain sum, part thereof in cash on a certain date, and the remainder by four promissory notes, is a covenant for payment of the purchase money when the notes become due, and is not performed by the *giving* of the notes only (*l*).

III. Of the different Kinds of Covenants.

1. *Express*, p. 404.
Running with the Land p. 408.
2. *Implied*, p. 411.
3. *Alternative*, p. 414.
4. *Joint and Several*, p. 414.
5. *Void or Illegal*, p. 420.

1. Of Express Covenants.

There is not any precise form of words necessary to constitute an express covenant: any form of words or mode of expression

(*f*) *Rhodes v. Bullard*, 7 East, 116.

(*g*) *Doe v. Keeling*, 1 M. & S. 95; *acc.*

Wickenden v. Webster, 6 E. & B. 387.

(*h*) *Doe v. Bird*, 2 A. & E. 161.

(*i*) *Brampton v. Beddoes*, 13 C. B. (N.

S.) 538.

(*k*) *Croft v. Lumley* (Dom. Proc.), 27 L. J., Q. B. 321.

(*l*) *Dixon v. Holdroyd*, 27 L. J., Q. B. 43.

in a deed, which clearly evinces an agreement, will amount to a covenant, for breach whereof an action of covenant may be maintained (*m*). As if it be *agreed* between A. and B. by deed, that B. shall pay to A. a sum of money for his lands on a certain day; these words amount to a covenant by A. to convey the lands to B. on that day (*n*). So if a lessee for years covenant to repair, "provided always, and it is *agreed*, that the lessor shall find great timber;" this word *agreed* will make a covenant on the part of the lessor to find great timber (*o*). *Secus*, if the word *agreed* had been omitted (*p*). So if A. lease to B. on *condition* that he shall acquit the lessor of charges, ordinary and extraordinary, and shall keep and leave the houses at the end of the term in as good a plight as he found them; if he does not leave them in good repair, an action of covenant lies (*q*). So where covenant was brought on a writing sealed, whereby the defendant's testator acknowledged himself to be accountable to the plaintiff for all such monies as should be charged by plaintiff on A. *to be paid to B.*; and alleged that he the plaintiff charged a certain sum of money on A. to be paid to B., and that the defendant's testator had not paid it; it was objected, that covenant did not lie, and that the proper form of action was an action of account; but it was held, that covenant would lie in this case, and on any words, in a deed purporting to be an agreement for the payment of money (*r*). So in a case of a lease for years *rendering* rent, it was adjudged that the word *render* made a covenant (*s*). So where covenant was brought against the executrix of an assignee of a lessee for years by indenture, for rent arrear in the time of the executrix, upon the words *yielding and paying*; it was held, that the action would lie; and the opinion of the court was, that the words "yielding and paying," in the indenture, made an express covenant, and were not a bare covenant in law (*t*). So in covenant against the assignee of lessee for years, upon an indenture whereby plaintiff demised to the lessee a house, *excepting* a room, with free liberty of passage unto the room excepted; lessee assigned the lease, and the assignee stopped the passage; whereupon plaintiff brought this

(*m*) *Per Parke, B., Rigby v. Great Western Railway*, 14 M. & W. 815.

(*n*) *Portage v. Cole*, 1 Wms. Saund. 319 l.

(*o*) 1 Roll. Abr. 518, (C.) pl. 2.

(*p*) *Ibid.* pl. 3.

(*q*) 1 Roll. Abr. 519, (C.) pl. 5.

(*r*) *Brice v. Carre*, 1 Lev. 47.

(*s*) *Giles v. Hooper*, Carth. 135.

(*t*) *Porter v. Sweetnam*, Sty. 406, 431; *Hellier v. Caspard*, 1 Sid. 266, S. P. These words "*yielding and paying*" have sometimes been considered as sufficient to raise a covenant by implication of law only. See a dictum to this effect, *Tilden v. Walter*, 1 Sid. 447; and *Kenyon*,

C. J., so considered them in *Webb v. Russel*, 3 T. R. 402. The same opinion is adopted in 1 Wms. Saund. 241, c, note 5. But in addition to the authorities in the text, it may be observed, that in Rolle's Abridgment, Covenant, (C.), the title of which is, "What words will make an express covenant?" in pl. 10, p. 519, this case is put as an instance of an express covenant: "If a man lease land for years, reserving a rent, an action of covenant lies for the non-payment of the rent; for the *reddendo* of the rent is an agreement for the payment of the rent, which will make a covenant."

action, declaring for a breach of covenant. Resolved by the court, that this exception amounted to a reservation, upon which covenant would lie; and they compared it to the preceding case of rent reserved, where covenant will lie upon the words of reservation, without any express words of covenant (*u*).

But it must be clear, that the words are meant to operate as an agreement, and not merely as words of qualification or condition. For where an assignee took, from a lessee, leasehold premises "subject to the payment of the yearly rent and to the performance of the covenants in the lease;" it was held, that these words did not constitute an agreement for the payment of rent, &c. *during the term*, and did not render the assignee liable to the lessee for rent which had become due, and which the lessee had been obliged to pay to the lessor, after the assignee had assigned over the premises; for the words were words of qualification, and not of contract (*x*).

Where the law creates a duty or charge, and the party is disabled from performing it, without any default on his part, and has not any remedy over, the law will excuse him; but where the party, *by his own contract*, imposes on himself a duty or charge, he is bound to make it good, notwithstanding inevitable accident; because he might have provided against it by his own contract (*y*). "Where an obligation is imposed by rule of law, and there is not any express covenant, the law introduces a reasonable exception, *viz.* that an act of irresistible violence will excuse the party; but if a party enter into an absolute contract, without any qualification or exception, and receives from the party with whom he contracts the consideration for such engagement, he must abide by the contract, and either do the act, or pay damages, his liability arising from his own direct and positive undertaking" (*z*).

A lease for years was made of a meadow bounded on one side by a river; and the lessee covenanted to sustain and repair the banks, to prevent the water from overflowing the meadow, upon pain of forfeiture of a sum of money; afterwards by a sudden and violent flood, the banks were destroyed, and, by the opinion of *Fitzherbert* and *Shelley*, Js., "The law is, that the lessee is excused from the *penalty*, because it is the act of God, which cannot be resisted; but still he is bound to make and repair the thing in convenient time, because of his own covenant" (*a*). So where the assignee of a reversion brought covenant against lessee of a house for non-payment of a year's rent; the lease contained a covenant on the part of the defendant to repair the house during the term, except

(*u*) *Bush v. Cōles*, Carth. 232.

(*x*) *Wolveridge v. Steward* (Exch. Chamb.), 1 C. & M. 644.

(*y*) *Paradine v. Jane*, Aleyn. 27. See *Atkinson v. Ritchie*, 10 East, 533, *per*

Lord Ellenborough, C. J.; *Evans v. Hut-*
ton, 4 M. & G. 954.

(*z*) *Per Chambre, J.*, *Beale v. Thomp-*
son, 3 B. & P. 420.

(*a*) *Dyer*, 33, *a*.

it should be destroyed by fire; the defendant pleaded, that before any part of the rent in question became due, the premises were destroyed by fire, against the will of defendant, and were not rebuilt by the lessor or the plaintiff; and that the defendant did not occupy the premises during the year for which the rent was claimed. On demurrer, it was held, on the authority of *Paradine v. Jane*, that the defendant was bound by his express covenant to pay the rent during the term (b).

In such case the general rule prevails, that equity follows the law; and a court of equity will not restrain a party from proceeding at law for rent arrear after the premises are destroyed by fire; the agreement for payment of the rent being without restriction (c); and in *Leeds v. Cheetham* (d), it was decided, that a tenant has no equity to compel his landlord to expend money received from an insurance-office, on the demised premises being burnt down, in re-building the premises, or to restrain the landlord from suing for the rent until the premises are rebuilt. In that case the defendant had demised to the plaintiff a cotton factory, with the steam-boiler, &c. for twenty-one years, at a rent of £ . The plaintiff covenanted to pay the rent, and to repair and keep repaired the inside of the cotton factory, &c., and the defendant covenanted to maintain the outside brickwork and all other outer parts of the premises in good and tenantable repair, &c. There was not any exception in respect of accidents by fire, either in the covenant for payment of the rent, or in the covenant to repair. During the term the factory was destroyed by fire. After the lease was granted, the defendant had insured the factory and buildings for 500*l.*, the steam-engine for 100*l.*, the engine-house for 60*l.*, and the gearing for 40*l.*; and, shortly after the fire, had received the total of these sums, *viz.* 700*l.*, from the insurance-office. The bill prayed that it might be declared, that the defendant was bound to apply the 700*l.* and the old materials, in reinstating the factory, steam-engine, &c., and that the plaintiff was not bound to pay the rent during such time as the factory, &c. should continue unrestored. Sir *J. Leach*, V. C., "Clearly, at law, the plaintiff, having covenanted to pay his rent during the whole continuance of the lease, is not entitled to any suspension of rent during the time that will be occupied in rebuilding and restoration of the premises: it appears to me that, in this respect, equity must follow the law; the plaintiff might have provided in the lease for a suspension of the rent in the case of accident by fire; but, not having done so, a court of equity cannot supply that provision, which he has omitted to make for himself; and it must be intended that the purpose of the parties was according to the legal effect of the contract. With respect to the equity, which the plaintiff alleges to arise from the defendant's receipt of

(b) *Monk v. Cooper*, 2 Stra. 763. See
Belfour v. Weston, 1 T. R. 310.

(c) *Gregg v. Coates*, 23 Beav. 33.
(d) 1 Sim. 146.

the insurance-money, there is no satisfactory principle to support it. The defendant, having so contracted with the plaintiff as to render himself liable to rebuild the outer work of the factory in case of accident by fire, has very prudently protected himself by insurance from the loss he would otherwise have sustained by such an accident; but upon what principle can it be that the plaintiff's situation is to be changed by that precaution on the part of the defendant, with which the plaintiff had nothing whatever to do? The plaintiff has sought his protection in the contract by the covenant, which he has required from the defendant; and to those covenants he must alone resort."

Ejectment by tenant against landlord to recover the possession of some houses which had been burned down during the term, and had been rebuilt by the landlord. In the lease there was an express covenant, on the part of the tenant, to pay the rent, but he had not paid any after the time of the fire. Lord *Mansfield*, C. J., said, the consequence of the houses being burned down was, that the landlord was not obliged to rebuild, but the tenant was obliged to pay the rent during the whole term. The houses having been burned down four years before action brought, and the rent not having been paid during that period, he left it to the jury to consider whether it was not to be presumed that the tenant had abandoned the lease at the time of the fire; and the jury found a verdict for the defendant (*e*).

A covenant for payment of rent, or a charge, frequently specifies some place where the payment is to be made. Where this is so, it is for the benefit of the person charged, who would otherwise be bound to seek his creditor. It is matter of defence, and must be specially pleaded (*f*).

Of Express Covenants running with the Land.—Covenants for title are frequently termed real covenants, and pass by the common law to the assignees of the land, who may maintain actions upon them against the vendor and his real and personal representatives (*g*). And as the covenants relate to the land, an assignee may maintain an action on them, although they were entered into with the original grantee and his heirs only; and where the covenants run with the land, although they are entered into with the party, his executors, and administrators, yet they will go to the heir with the land. The right of action, even for a breach in the ancestor's lifetime, will descend to the heir, and not to the executor, where no actual damage was sustained by the ancestor (*h*). See *post*, IV. 1.

(*e*) *Pindar v. Ainsley*, cited 1 T. R. 503.
312.

(*f*) *Paine v. Emery*, 5 Tyrw. 1100, n.

(*g*) *Middlemore v. Goodale*, Cro. Car.

(*h*) See 2 Sugden's V. & P. 458 (10th ed.), and cases there cited.

Express covenants, which run with the land, entered into by lessee for years, for himself, his executors, administrators, and assigns, are binding on the lessee and his personal representative (having assets), during the continuance of the term; although such covenants are broken, after an assignment of the term by the lessee, and after an acceptance of rent from the assignee by the lessor, or grantee of the reversion; and there is not any distinction in this respect between a voluntary assignment by the lessee and a compulsory transfer by virtue of the bankrupt laws (*i*). In covenant against lessee of a house by indenture, wherein the lessee had covenanted for himself, his executors, and assigns, that he would repair within a month after warning; the breach assigned was for not repairing the house within a month after warning given; the defendant pleaded, that a long time before that warning he assigned his term to J. S., who paid his rent always afterwards to the plaintiff, who had accepted the same; and then averred the performance of all the covenants until the assignment; the plaintiff demurred, on the ground that this assignment did not take from the lessor his advantage of the *express* covenant; and, notwithstanding his acceptance of rent by the hands of the assignee, yet he might charge the lessee or assignee at his election; and the whole court being of that opinion, it was adjudged for the plaintiff (*k*). The same point was ruled (*l*) in a case where the lessee had covenanted for himself and his assigns to repair; on the ground that the lessee had expressly covenanted for himself and his assigns, and that this personal covenant could not be transferred by the acceptance of the rent. So where the breach was for non-payment of rent (*m*). A bankrupt was held to be bound by an express collateral covenant (to indemnify plaintiff against the covenants of a lease), which had been broken after an act of bankruptcy committed, and after the defendant had obtained his certificate (*n*).

From the foregoing cases it appears clearly, that express covenants, which run with the land, entered into by lessee for years, for himself, his executors, administrators, and assigns, are binding on the *lessee* during the continuance of the term, although such covenants are broken after an assignment of the term by the lessee, and after the acceptance of rent from the assignee by the lessor or grantee of the reversion; it remains only to add, that such covenants, under the same circumstances, are binding on the personal representative of the lessee *having assets*. In covenant by the

(*i*) *Auriol v. Mills*, 4 T. R. 94. But see 12 & 13 Vict. c. 106, s. 145, *post*.

(*k*) *Barnard v. Godscall*, Cro. Jac. 309.

(*l*) *Ventrice v. Goodcheap*, 1 Roll. Abr. 522, (N.) pl. 1.

(*m*) *Devon v. Collier*, 1 Roll. Abr. 522, (N.) pl. 1; and see *Fisher v. Ameers*, 1

Brownl. 20; *Thursby v. Plant*, Sid. 402; Sid. 447, *nota*; *Boulton v. Cann*, Freem. 337; *Ashurst v. Mingay*, 2 Show. 134; *Edwards v. Morgan*, 3 Lev. 233; *Jodderell v. Cowell*, Ca. Temp. Hardw. 343.

(*n*) *Mayor v. Steward*, 4 Burr. 2439.

lessor against the executor of lessee for years, on an indenture, by which the lessee had covenanted for himself, his executors, and assigns, that he would not erect any building in the garden demised to the prejudice of the lessor's lights; it was alleged, that an assignee of defendant's testator had erected a house in the garden to the prejudice of the lessor's lights. Defendant pleaded an assignment of the term to J. S., who had paid rent to the lessor, and had been accepted by him as tenant. On demurrer, it was contended, on the part of the defendant, that by the assignment and acceptance of rent, the privity of contract was determined, more especially as it was a contract which concerned an act to be executed on the land, and therefore running with the land; but the court conceived, that as it was an express covenant, that the lessee should not build, it should bind him and his executors; and neither an assignment, nor an acceptance of rent from the assignee, could deprive the lessor of the advantage of suing the lessee or his executors on an express covenant (o).

Queen Elizabeth, by letters patent, demised a house for years, which the lessee covenanted to repair. On the death of the Queen, the reversion descended to King James, when the lessee assigned his term, and the assignee paid rent to the King, who afterwards granted the reversion to the plaintiff; the house being out of repair, the plaintiff brought covenant against the executors of the lessee for a breach of the covenant committed after an assignment of the term and reversion, and after plaintiff had accepted rent from the assignee of the term; it was held, that the action would lie, on the ground that it was a covenant in fact, by the express words, running with the land: and that, notwithstanding an assignment, the covenantor and his executors were always chargeable, so that he could not, either by the assignment of his estate, or by any other act, discharge himself or his executors (who were chargeable by the act of the testator), *having assets*, as long as the reversion continued in the lessor; and by the express words of 32 Hen. VIII. c. 34, such remedy as the lessor might have had against the lessee or his executors, the assignee of the reversion shall have against them (p): *it being a covenant in fact, which runs with the land* (q). A covenant against building entered into by a purchaser of land (who was also owner of adjoining lands), his heirs and assigns, runs with the land, and may be enforced by a subsequent purchaser of part of such adjoining land (r).

A covenant made between a lessee holding under letters patent, and his under-lessees, that he would procure the original letters

(o) *Bachelour v. Gage*, Cro. Car. 188, and Sir W. Jones, 223; *Arthur v. Vanderplank*, B. R. H. 7 Geo. II. MS. S. P.

(p) At common law covenants run with the land, but not with the reversion. *Thursby v. Plant*, 1 Wms. Saund. 240,

n. (a).

(q) *Bret v. Cumberland*, Cro. Jac. 521.

(r) *Western v. Macdermot*, 1 L. R., Eq. 499; 35 L. J., Ch. 190. *S. C.* on appeal, 2 L. R., Ch. App. 72; 35 L. J., ch. 76.

patent to be renewed, and the lease under which he held to be confirmed absolutely for a certain term, is a covenant which runs with the land, inasmuch as it affects the very existence and continuance of the term itself" (s). *Quære* whether a covenant not to carry on an offensive trade runs with the land (t). See further as to covenants running with the land, and rights and liabilities of assignees, *post*, "*Of Particular Express Covenants*."

2. *Of Implied Covenants* (u).

In order to constitute a covenant, it is not necessary that the word "covenant" should be employed (x), for there are certain words, which, though of themselves they do not import any express covenant, yet, when used in contracts by deed, will amount to a covenant (y). As if A., by indenture, "*demise and grant*" lands to B. for years, and C. enters and evicts B. by rightful title, B. may maintain an action on the implied covenant; and A. is estopped from saying that B. was not in by the lease (z). But now, by 8 & 9 Vict. c. 106, s. 4, the word "give," or the word "grant," in a deed shall not imply any covenant in law in respect of any tenements or hereditaments, except so far as those words may, by force of any act of parliament, imply a covenant (a). The above act does not apply to the word "demise" (b).

If a lessor demise land for a term of years, and afterwards by the words *dedi et dimisi* demise the same land to A. for life, who enters and is ousted by the termor for years; A. may maintain an action against the lessor on the implied covenant, and have satisfaction in damages for the chattel evicted; for he continues seised of the freehold (c). In covenant on a lease for years made by the defendant by the word *dimisi*, it was averred, that at the time of the lease made, the lessor was not seised of the land, but a stranger; it was objected, that the entry of the lessee by force of the lease, and ejectment by the stranger, or some person claiming under him, were not alleged; but the court was of opinion, that the action would lie; for the breach of covenant was, that the lessor had undertaken to demise that which he could not, the word

(s) *Simpson v. Clayton*, 4 B. N. C. 780.

(t) *Wilson v. Hart*, 12 L. T. (N. S.) 789.

(u) The doctrine of implied covenants, *i. e.*, of covenants implied from the use of particular words, is confined to real property. Hence, if goods be demised for years, and the lessee be evicted, covenant does not lie; for the law does not create a covenant for a personal thing. Com. Dig. Cov. (A. 4.)

(x) *Stevenson's case*, 1 Leon. 324; cited in *Saltoun v. Houstoun*, 1 Bingh. 440; and see *Sampson v. Easterby*, 9 B. & C. 505; (Exch. Cham.), 6 Bingh. 644, *S. C.*

(y) 1 Roll. Abr. 519, (F.)

(z) *Style v. Haring*, Cro. Jac. 73.

(a) As to the words "bargain and sale," see *Barton v. Fitzgerald*, 15 East, 529.

(b) See *per Parke, B.*, in *Doughty v. Bowman*, 11 Q. B. 454. Whether the words "to let," in an agreement for a lease, imply a contract for quiet enjoyment, *quære*. *Messent v. Reynolds*, 3 C. B. 194, and *quære*, whether the words "to let" in a deed would be equivalent to the words "to demise." *Per Cresswell, J.*, *S. C.*

(c) *Pincombe v. Rudge*, *Yelv.* 139.

dimisi importing a power of letting, as *dedi* does a power of giving; and they added, that it was not reasonable to enforce the lessee to enter upon the land, and so to commit a trespass (*d*). And where a lease for years is made by the words "demise," the assignee of the lessee is entitled to the same advantage as the lessee, and may in case of eviction maintain an action on the implied covenant (*e*).

Tenant for life, remainder over, by indenture demised for fifteen years, without any express covenant for quiet enjoyment; the lessee was ousted by the remainderman, after the death of the tenant for life, but, before the expiration of the fifteen years: it was held, that the lessee could not maintain an action of covenant against the executor of the tenant for life; for the covenant in law ends and determines with the estate of the lessor (*f*).

The implied covenant follows the nature of the interest granted; as where A. and B. made a lease by the word "*dimiserunt*;" it was held, that the implied covenant was joint, viz., that A. and B. had power to demise, and that an action on the ground of their not being seised at the time of the demise should be brought against both, and could not be maintained against one only (*g*).

The generality of an implied covenant may be qualified and restrained by an express covenant. As where the lessor *demised, &c.*, a house for a term of years, and covenanted, that the lessee should enjoy the house during the term, *without eviction by the lessor, or any claiming under him* (*h*); it was held, that the express covenant qualified the generality of the covenant raised by implication of law from the words *demise, &c.*, and restrained it by the mutual consent of both parties, so that it should not extend further than the express covenant (*i*). Sir *E. Coke*, from whose Reports this case is taken, subjoins as follows: "And there is great reason, that the particular covenant subsequent should qualify the general force of this word "*dimisi*," for otherwise the particular covenant would be in vain if the force of this word "*dimisi*" should stand, and these words *dimisi et concessi* are frequent in every ordinary lease that is made; and the better construction of deeds is to make one part of a deed expound the other, and so to make all the parts agree, and, *quoad fieri possit*, according to the true intent and meaning of the parties." So where in a covenant on an indenture, whereby the defendant granted a fee farm rent to the plaintiff, and covenanted that he was seised in fee, and had good right to sell; the breach assigned was, that he had not good right; the defendant pleaded, that it was further agreed, in the same indenture, that all

(*d*) *Holder v. Taylor*, Hob. 12; 1 Inst. 301, b.

(*e*) *Spencer's case*, 5 Rep. 17, a, 4th Resol.

(*f*) *Adams v. Gibney*, 6 Bingh. 656. See *Woodhouse v. Jenkins*, 9 Bingh. 431.

(*g*) *Coleman v. Sherwin*, Salk. 137.

(*h*) See *Stanley v. Hayes*, 3 Q. B. 105; *Spencer v. Marriott*, 1 B. & C. 457.

(*i*) *Nolke's case*, 4 Rep. 80, b.; *Line v. Stephenson*, 4 B. N. C. 678; (in Exch. Cham.) 5 B. N. C. 183, S. C.

the covenants in the indenture should not extend further than to acts done by the vendor and his heirs, whereon the plaintiff demurred; and although this was a remote agreement at the end of the deed, at a great distance from the other covenant, it was adjudged, that it had qualified the first covenant, and restrained it to acts done by the *covenantor only* (l).

Where a lessee covenanted that he would at all times and seasons of burning lime, supply the lessor and his tenants with lime, at a stipulated price, for the improvement of their lands and repair of their houses; it was held, that this was an implied covenant also that he would burn lime at all such seasons, and that it was not a good defence to plead that there was no lime burned on the premises out of which the lessor could be supplied (m). So where the plaintiffs covenanted with a water company to complete a well and works mentioned in certain drawings and specifications prepared by the company's engineer, finding all materials, &c., and the specification, which was under the seal of the company, contained the following passage: "The contractor will be required to sink the well, &c., to the depth of 120 feet, &c., after which the company will undertake the erection of the permanent steam engine, and permit the pumping to be performed by it, sufficient interval of time being allowed for the erection of the steam engine, and such time added to the period assigned to the contractor for the performance of the works;" it was held, that there was an implied covenant on the part of the company to erect the steam engine as provided in the specification (n). So where a railway company demised certain refreshment rooms at Swindon to the plaintiffs, and it was declared to be *the intention* of the defendants and the understanding of the plaintiffs that the defendants should give every facility to the plaintiffs for obtaining an adequate return for their capital invested in the refreshment rooms; that all passenger trains should, with certain exceptions, stop at the station for a reasonable period of about ten minutes, and that the defendants engaged *not to do any act which should have an effect contrary to the above intention*, it was held that this amounted to a covenant, on the part of the company, not to do any act to prevent the trains from stopping at the station aforesaid (o).

But, although, where from words of recital or reference, a clear intention is manifested that the parties *should do* certain acts, the courts will infer a covenant to do such acts, yet it does not follow that where parties have expressly covenanted to perform certain acts, they must be held to have impliedly covenanted for every act

(l) *Brown v. Brown*, 1 Lev. 57. See *Browning v. Wright*, 2 B. & P. 513.

(m) *Earl of Shrewsbury v. Gould*, 2 B. & Ald. 487. See *Webb v. Plummer*, *ibid.* 746, but see *Guillim v. Daniel*, 2 C. M. & R. 61.

(n) *Knight v. Gravesend Water Co.*, 2 H. & N. 6; and see *Great Northern Railway v. Harrison*, 12 C. B. 576.

(o) *Rigby v. Great Western Railway*, 14 M. & W. 811.

convenient or even necessary for the perfect performance of their express covenants; the presumption is, that the parties, having expressed some, have expressed all, the conditions by which they intend to be bound under the instrument (*p*). So the fact that parties have entered into certain engagements, upon the supposition that certain acts would be done, does not imply a covenant on the part of either to do those acts (*q*).

3. *Alternative Covenants.*

The construction to be put on covenants to which there is an alternative in nowise differs from that of other covenants; it is still the *intention* of the parties which has to be ascertained. Where the plaintiff granted to the defendant a licence to use a patent for a term of years on payment of a certain royalty, and the defendant covenanted to pay it, and that if the royalty fell short of 2,000*l.* in any year, he would pay, within fourteen days of the expiration of the year, such a sum as with the royalty reserved made up that amount; “*or*, if the defendant shall at any time make default in such sum of money aforesaid within the time appointed for payment, then it shall be lawful for the plaintiff, by writing, &c., to declare that the said indenture and the powers and licence thereby granted shall cease and determine;” it was held, that this was not an absolute covenant to pay 2,000*l.* a year during the term, but an alternative covenant enabling the plaintiff to put an end to the term on non-payment of that sum by the defendant (*r*). But where the plaintiff agreed to serve the defendant in a certain business for seven years at a salary of 100*l.* a year, and the defendant agreed to pay the salary; and that if the defendant should from any cause give up the business or not require the plaintiff’s services, he would use his best endeavours to procure for the plaintiff employment in some similar business, at a salary of not less than 100*l.* a year; *or in case he should be unable to do so*, then that he would pay to the plaintiff 100*l.* a year during the residue of the seven years; it was held, that it was not open to the defendant to choose between using his best endeavours to find the plaintiff a situation and paying him 100*l.* a year, but that he was bound to use his best endeavours in the first instance, and could only resort to the payment of the 100*l.* on failure of those endeavours (*s*).

4. *Of Joint Stock and Several Covenants.*

Where the *interest*, *i. e.*, the legal interest (*t*), of the covenantees is joint, the action of covenant generally follows the nature of the

(*p*) *Aspdin v. Austin*, 5 Q. B. 671.

(*r*) *Tielens v. Hooper*, 5 Exch. 830.

(*q*) *Rashleigh v. South Eastern Railway*, 10 C. B. 632, *per Maule, J.*;

(*s*) *Rust v. Nottidge*, 1 E. & B. 99.

James v. Cochrane, 7 Exch 177, *per Parke, B.*

(*t*) *Anderson v. Martindale*, 1 East, 501.

interest, and must be brought in the names of all the covenantees ; and this rule holds, even where the *covenant* is in terms joint and several ; for such a wording of the covenant cannot make that, which was before joint, several (*u*) ; and a covenant cannot be both joint *and* several (*x*). So on the other hand, where the *interest* is several, although the *covenant* be (*primâ facie*) joint, yet it shall be taken to be several. Bull. N. P. 157. "Where the covenant is to several for the performance of several duties to each, the covenant should be moulded according to the several interests of the parties, and each shall only recover for a breach so far as his own interest extends." *Per Kenyon*, C. J. (*y*).

If the interest of the covenantees be several, they may maintain separate actions, although the language of the covenant be (*primâ facie*) joint (*z*). "The result of the cases appears to be this, that, where the legal interest *and cause of action* of the covenantees are *several*, they shall sue separately, though the covenant be joint in terms ; but the several interest and the several ground of action must distinctly appear :—on the other hand, *if the cause of action be joint*, the action should be joint, though the interest be several" (*a*). If the covenantees *can* sue jointly, they are bound to do so (*b*), and *vice versâ* (*c*). "The rule is, that a covenant will be construed to be joint or several according to the interest of the parties appearing upon the face of the deed, *if the words are capable of that construction* ; not that it will be construed to be several by reason of several interests, if it be *expressly* joint" (*d*). "The rule that covenants are to be construed according to the interest of the parties, is a rule of construction merely, and it cannot be supposed that such a rule was ever laid down as could prevent parties, whatever words they might use, from covenanting in a different manner. It is impossible to say that parties may not if they please use joint words, so as to express a joint covenant, and thereby to exclude a several covenant ; and that, because a covenant may relate to several interests, it is therefore necessarily not to be construed as a joint covenant. If there be words *capable of two constructions*, we must look to the interest of the parties which they intended to protect, and construe the words according to that interest" (*e*).

Where B. by indenture covenanted with C. and D., and to and with E. and F. his wife (who afterwards became the wife of D.),

(*u*) *Eccleston v. Clipsham*, 1 Wms. Saund. 153.

(*x*) *Per Rolfe*, B., *Keightley v. Watson*, 3 Ex. 723.

(*y*) *Anderson v. Martindale*, 1 East, 501.

(*z*) *James v. Emery*, 8 Taunt. 245 ; *Palmer v. Sparshott*, 4 M. & G. 137.

(*a*) *Per cur.* *Foley v. Addenbrooke*, 4 Q. B. 197.

(*b*) *Foley v. Addenbrooke*: *per Parke*, B., *Bradburne v. Botfield*, 14 M. & W. 564 ; but see *Simpson v. Clayton*, 4 B. N. C. 781.

(*c*) *Servante v. James*, 10 B. & C. 410.

(*d*) *Per Parke*, B., *Sorsbie v. Park*, 12 M. & W. 158.

(*e*) *Per Parke*, B., *Keightley v. Watson*, 3 Exch. 723 ; *per Maule*, J., *Beer v. Beer*, 12 C. B. 78, *acc.*

and their assigns, *and to and with each of them*, that he (B.) at the time of sealing and delivering the indenture was lawfully and solely seised of a certain rectory; and an action was brought by D. and F. his wife, for a breach of the covenant: the judgment for the plaintiff was reversed on error, upon the ground that notwithstanding the words "*and to and with each of them*," the other covenantee should have joined in the action (*f*). Where it appears on the face of the declaration that each of the covenantees is to have a several interest or estate, then the addition of the words "*with each of them*," will make the covenant several in respect of their several interests; as if one by indenture demise Blackacre to A. and Whiteacre to B., and covenant with each of them, that he is lawful owner of both the said acres; then, in respect of the several interests, the covenant by those words is made several (*g*). Where the defendant and others, having formed a scheme for erecting by subscription a corn market, executed a deed poll, whereby they covenanted severally and respectively, *to and with each other and to and with the plaintiffs*, each to pay the sums therein mentioned for erecting the same within four years, the money to be advanced at such times and in such proportions, &c., as a committee appointed by the subscribers should direct; and in case of the said committee not requiring any payments within the four years, then, at such times and in such proportions, &c. as the plaintiffs should direct, and, the committee having made default in requiring payments within the four years, the plaintiffs sued alone for the non-payment of the sum set opposite the defendant's name in the deed; it was held, that it was a joint covenant with *the subscribers and the plaintiffs*, and not with the plaintiffs alone. Judgment for defendant (*h*).

Where by deed, reciting the grant of *two distinct* annuities, to A. and B. during the life of the grantors and the survivor of them, C. for a *several* consideration covenanted with A. and B. to pay the annuities or either of them if the grantors should make default. A. died; it was held, that, although regarding only the language of the covenant it would appear to be joint, yet the interest of the covenantees was several, each having a distinct interest in the annuity payable to him; and consequently that an action was well brought by the executor of that covenantee whose annuity was in arrear (*i*). If a lease of land be granted to A. and B. to commence at a future day, and A. and B. jointly *and severally* covenant for the performance of certain acts, and A. dies before the day, the covenant being joint and several, will be binding on the executors of A., although the *interesse termini* survive to B. (*j*).

(*f*) *Slingsby's case* (Exch. Cham.), 5 Rep. 18, b. See *Lane v. Drinkwater*, 1 C. M. & R. 599.

(*g*) *Ibid.*

(*h*) *Sorsbie v. Park*, 12 M. & W. 146.

(*i*) *Withers v. Bircham*, 2 B. & C. 254.

(*j*) *Enys v. Donwithorne*, 2 Burr. 1190.

The defendant covenanted that he would not agree for the taking the farm of the excise of beer and ale for the county of York without the consent of the plaintiff and another; and the plaintiff alone brought an action of covenant, and assigned for breach the defendant's agreeing for the said excise without his consent; upon which the plaintiff had a verdict, and one thousand pounds damages given. The court were of opinion, that there was no joint interest, but that each of the covenantees might maintain an action for his particular damages, or otherwise one of them might be remediless: for, suppose one of them had given his consent that the defendant should farm this excise, and had secretly received some satisfaction or recompense for so doing, is it reasonable that the other should lose his remedy, who never did consent? (*k*)

Where by indenture, reciting that the proprietors of a certain colliery had agreed to divide it into eighteen shares, fifteen of which the parties to the deed of the third part had agreed to buy (the proprietors retaining the remaining three shares), and had *each* paid down 1,000*l.* in respect of his share; *each* of the said proprietors *severally* covenanted with *each* of the shareholders to produce a good title; it was held, that each shareholder covenantee might sue separately upon the covenant, on the failure of the proprietors to make a good title (*l*). Where A. (the plaintiff) had agreed to sell land to B., which B. had agreed to sell to C. and D. (the defendants), and the defendants covenanted with A. (the plaintiff), and "*as a separate covenant*" with B., that they would on a certain day pay to the plaintiff, or to the said B. in case the plaintiff should then have been paid his purchase-money, the sum in the deed mentioned, and would in the meantime pay interest to A. (the plaintiff) on so much of the purchase-money as remained unpaid; it was held, that A. might sue *alone* for interest on the unpaid portion of the purchase-money, without joining B. (*m*).

Where the interest of the covenantees is joint, if any of them die, the action must be brought by the survivors averring the deaths of their companions (*n*). As where A., by indenture, covenanted with B. and C., that he (A.) would enter into a bond to pay B. a sum of money on a certain day: B. died; B.'s administrator brought covenant; it was adjudged that it did not lie; for, although the money was to be paid to B., who was dead, yet he who survived and was party to the indenture ought to have sued; for B. and the survivor made, as to this purpose, but one person. As if a bond is made to three to pay money to one of them, all ought to join in the suit, for they are all as one obligee: and if he who ought to have the money dies, the survivors must sue, although they have not any interest in the sum contained in the condition:

(*k*) *Wilkinson v. Lloyd*, 2 Mod. 82.
 (*l*) *Mills v. Ladbrooke*, 7 M. & G. 218.

(*m*) *Keightley v. Watson*, 3 Exch. 716.
 (*n*) *Scott v. Godwin*, 1 B. & P. 67.

so in this case, the money payable to B., in his lifetime, being to be obtained by suit on the indenture, an action could not be brought thereon, except by those who were parties during their lives, and after their death by the executor or administrator of the survivor (o). So where M. for himself, and the defendant as his surety, jointly and severally covenanted with A., his executors, &c., and also with W. and her assigns, that he (M.) would pay to A., his executors, &c., an annuity during the life of W.; A. died intestate, and an action was brought by his administrator against the defendant, on the covenant, assigning as a breach the non-payment of the annuity; it was held, that the covenant being both to A. and W. for the same thing, although the benefit were only to A., yet both had a legal interest in the performance of it; and therefore, such interest being joint during the lives of both, on the death of one it survived to the other (p).

The reversion of lands demised by indenture to the defendant for years was conveyed to A. and B. and the heirs of B. in trust for A. and his heirs: A. brought an action against defendant, on a covenant to repair contained in the lease, stating his title as above. It was held, 1st, that A. and B. were joint assignees of the reversion, the effect of which was, that the defendant's covenants became, by operation of law, contracts with A. and B. jointly, and that all causes of action to them arising out of those contracts must follow the nature of the contracts, and must accrue to A. and B. jointly; 2ndly, that on demurrer, it could not be intended that B., the joint covenantee, was dead, in order to sustain the declaration; that the plaintiff ought to have shown what was necessary to make out his title, and having, by his own statement, given the legal estate to *himself and another*, he ought to have taken upon himself the burthen of divesting that legal estate in the other, and vesting it in himself; he should therefore have averred that B. was dead (q). From the cases of *Anderson v. Martindale*, and *Scott v. Godwin*, it appears, that if the objection on the ground of other covenantees not being joined as plaintiffs, arises on the face of the declaration, the defendant may take advantage of it by demurrer, and, according to *Slingsby's case*, by writ of error (r).

All joint covenantees, who may sue, must sue; and joint covenantees may sue, although they have not executed (s); notwithstanding there are cross covenants on the part of the covenantee, which are stated in the deed to be the consideration for the covenants on the part of the covenantor (t). Even if one covenantee

(o) *Rolls v. Yate*, 1 Bulstr. 25 (on error).

(p) *Anderson v. Martindale*, 1 East, 497.

(q) *Scott v. Godwin*, 1 B. & P. 67.

(r) See *Vernon v. Jefferies*, 7 Mod. 360.

(s) Except in the case of leases; for if

the lessor (the covenantee) does not execute the lease, no interest passes; and the covenants dependent on the lease fall to the ground with it. *Swatman v. Ambler*, 8 Exch. 72; *Petrie v. Bury*, 3 B. & C. 353. See *post*, p. 419.

(t) *Morgan v. Pike*, 14 C. B. 473.

has disclaimed the covenant by deed, the other cannot sue *alone* upon the covenant (*u*). But where one of two partners signed a composition deed in the name of the firm, and set his seal thereto, for the payment of an instalment due on a partnership debt; it was held, that the other partner, not being a party to the deed, could not join in an action of covenant for the non-payment of the instalment, and that the action was rightly brought by the partner who alone had executed the deed (*x*). If an indenture is made between A. and B. on the one part, and C. and D. on the other, and there are covenants on each side, and A. alone seals on the one part, and C. and D. on the other; but it is expressed throughout the indenture that A. and B. covenant and are covenanted with; in such a case A. and B. may join in an action against C. and D. for a breach of one of the covenants (*y*).

A. and B., and *each* of them, by indenture granted an annuity, and B. covenanted that A. and B. would duly pay the same; to an action for non-payment against B., he pleaded that A. at the time of the making of the indenture was an infant, whereby, and according to the statute, the indenture was void; on demurrer, it was held that B. was liable (*z*).

Where there are several covenantees, and one of them only brings an action, without averring in the declaration that the others are dead; the defendant may, if it appear on the face of the declaration, demur (*a*), he may also take advantage of it at the trial, as a variance under the plea of *non est factum* (*b*), but it would be now amendable either before or at the trial under ss. 34, 35, and 36, of the Comm. Law Proc. Act, 1852. In *Eccleston v. Clipsham*, 1 Saund. 153, the objection was taken in arrest of judgment, but the omitted facts, *i. e.* the death of the other defendants, might now be suggested under sect. 143 of the last-mentioned act.

Where there are two covenantors, and one only is sued, the defendant must take advantage of the omission by plea in abatement (*c*). But by 3 & 4 Will. IV. c. 42, s. 8, no plea in abatement for the nonjoinder of any person as a co-defendant shall be allowed, unless it shall be stated in the plea, that such person is resident within the jurisdiction of the court, and unless the place of residence of such person shall be stated with convenient certainty in affidavit verifying such plea; and a plea which does not comply with the above statute is bad on demurrer (*d*). The plaintiff may reply the discharge of such person by bankruptcy and certificate.

(*u*) *Wetherell v. Langston*, 1 Exch. 634.
Whether in such a case a *joint* action could be maintained, *quære*, *S. C.*

(*x*) *Metcalf v. Rycroft*, 6 M. & S. 75.

(*y*) *Clement v. Henley*, 2 Roll. Abr. Faits, (F) 2.

(*z*) *Gillow v. Lillie*, 1 B. N. C. 695.

(*a*) Bull. N. P. 158; *Scott v. Godwin*, 1 B. & P. 671.

(*b*) 1 Wms. Saund. 154, n. (1).

(*c*) *Per Lee*, C. J., *Vernon v. Jefferies*, 7 Mod. 360.

(*d*) *Joll v. Lord Curzon*, 4 C. B. 249.

5. *Of Void and Illegal Covenants (e).*

Although the law, from the deliberation and solemnity which accompanies the execution of a deed, presumes a consideration, and relieves the covenantee from the necessity of proving it, yet that doctrine applies only where the deed is good on the face of it; for a consideration cannot be presumed to support a deed which is void on the face of it. Hence, where the plaintiff declared, that the defendant, being single and unmarried, by deed promised the plaintiff (she being sole and unmarried) that he would not marry with any other person except herself, and if he should marry with any other, then he agreed to pay the plaintiff 1,000*l.* within a certain time after such marriage; and, after averring that defendant had married another person, assigned for breach the non-payment of the money: it was held, that this covenant not to marry anybody, except a person who was not obliged to marry, being to every purpose the same as a general restraint, and being unsupported by any consideration, the principle of public utility interposed, and forbad the sustaining an action for the breach of it (*f*).

A covenant by a husband to pay to trustees a certain annual sum, by way of separate maintenance for his wife, in case of their future separation, *with the consent of such trustees*, is valid in law (*g*), for there is nothing illegal in a separation between husband and wife, for good cause, and "the parties agreeing to refer the question—what is a good cause of separation—to a domestic forum" (in this case the trustees), "instead of applying to the Ecclesiastical Court for a divorce and alimony" (*h*). But a covenant for separation generally at the will of the wife is contrary to the policy of the law. Where therefore, on the face of the deed, it appears that the parties contemplate present cohabitation and future separation, the deed is void (*i*); for that is offering a premium to the wife for leaving her husband (*k*). So where a deed was made between husband, wife, and a trustee, providing a separate maintenance for the wife, and purporting to be made in contemplation of an immediate separation, but in fact no separation then took place, nor was intended to take place at that time, the deed was held void (*l*). But a deed made in contemplation of an immediate separation, which actually takes place, is not, it seems, avoided by subsequent cohabitation, if that contingency is provided for by the deed (*m*).

A covenant made in general restraint of trade is void; such as,

(*e*) See *post*, VIII. 3.

(*f*) *Lowe v. Peers*, 4 Burr. 2225; Wilmot, 364. See *Gibson v. Dickie*, 3 M. & S. 463.

(*g*) *Rodney v. Chambers*, 2 East, 283.

(*h*) *Per Lawrence, J.*, *Chambers v. Caulfield*, 6 East, 252. The Ecclesiastical Courts are abolished by 20 & 21

Vict. c. 85.

(*i*) *Durant v. Titley*, 7 Price, 577.

(*k*) *Per Bayley, J.*, in *Jee v. Thurlow*, 2 B. & C. 552.

(*l*) *Hindley v. Marquis of Westmeath*, 6 B. & C. 200.

(*m*) *Wilson v. Mushett*, 3 B. & Ad. 743. See *ante*, "Baron and Feme."

by the lessor of a brewery, that he will not during the demise carry on the business of a brewer for the sale of ale in S. or elsewhere, or in any other manner be concerned in the business (*n*). But if the restraint be only particular in respect to time and place it is good.

A covenant by a friend of a bankrupt to pay all his creditors their full debts, in consideration that they will not proceed any further under the commission, is good (*o*). So is a covenant with a lessor of premises in a parish to indemnify the parish against any paupers, which the covenantor may cause to be settled in it (*p*).

There is no obligation to perform the covenants in a void grant conveying an estate, granting a lease, &c., and if the conveyance or lease is void, *relative and dependent covenants are void also*. Thus, where A., being possessed of a term, granted to B. so much of the term as should be unexpired at the time of his death, and covenanted for B.'s quiet enjoyment: the lease being void for uncertainty, the covenant was held void also (*q*). But where a covenant is a distinct, separate, and independent covenant, not referring to the estate intended to be granted, nor waiting upon it; in that case, although no estate is granted, yet the covenant will be valid. "When that which is good and that which is void are put together in the same grant, the common law makes such a construction, that the grant shall be good, for that which is good; and void, for that which is void." *Per Lawrence, J. (r)*. As where the plaintiff declared, that the defendant, by deed, granted to him in fee, provided that if the grantor paid so much money, it should be lawful for him to re-enter, and that the defendant covenanted to pay the money to the plaintiff, and assigned for breach the non-payment of the money. After judgment, it was objected, that nothing passed by the deed for want of inrolment, which was admitted; and hence it was inferred, that the covenant was void. But *Holt, C. J.*, said, that it was not material whether any estate passed; for the covenant to pay the money was a distinct, separate, and independent covenant (*s*). So where a rector granted an annuity out of his benefice, which is void by 13 Eliz. c. 20 (*t*), and in the same deed covenanted personally to pay the annuity; it was held, that, although the statute avoided the security of the rentcharge upon the living, yet it did not affect the personal covenant (*u*). So though a bill of sale for transferring the property in a ship, by way of mortgage, may be void as such, for not reciting the certificate of registry, as

(*n*) *Hinde v. Gray*, 1 M. & G. 195.
See *post*, "Debt," III. "Illegal Consideration."

(*o*) *Kaye v. Bolton*, 6 T. R. 134.

(*p*) *Walsh v. Fussell*, 6 Bingh. 163.

(*q*) *Capenhurst v. Capenhurst*, 1 Lev. 45.

(*r*) 8 East, 236.

(*s*) *Northcote v. Underhill*, Salk. 199.

(*t*) See *Shaw v. Pritchard*, 10 B. & C. 241.

(*u*) *Sloane v. Packman*. 11 M. & W. 770.

was required by 26 Geo. III. c. 60, s. 17 (x); yet the mortgagor may be sued on a collateral covenant, for the payment of the money contained in the same deed (y). In like manner, although a covenant by the lessee for the payment of the property tax, and for indemnifying the landlord from it, was void by 46 Geo. III. c. 65, ss. 115, 195; yet that would not avoid other independent covenants in the lease, such as the covenant for the payment of the rent (z).

Where A. covenants not to do an act which it was then lawful to do, and a subsequent statute compels him to do such act, this statute extinguishes the covenant; but if A. covenants not to do an act then unlawful, and a subsequent statute makes it lawful to do the act, the covenant is not extinguished (a).

The assignee of a void lease cannot maintain an action for a breach of any of the covenants contained in the lease. Tenant in tail demised land for ninety-nine years, and covenanted for himself and his executors for the quiet enjoyment of the lessee. The tenant in tail died without issue. After his death, the lessee assigned to the plaintiff, who entered, but shortly after was ejected by the remainderman, whereupon the plaintiff brought an action against the executors of the tenant in tail for a breach of the covenant; but it was held, that it would not lie: for, the lease being void at the time of assignment, no interest passed under it (b).

The plaintiff declared, that by deed made between her, *as attorney for I. S.* on the one part, and the defendant on the other part, she demised a house to the defendant, and that he covenanted (not saying with the plaintiff) to pay the rent to I. S., and then assigned a breach in non-payment of rent, to the damage of the plaintiff (the attorney). It was objected that the lease was void, and that an action could not be maintained upon it, especially by the plaintiff, who was the attorney only, and to whom the rent was not reserved; neither was there any covenant *with the plaintiff*, the words being general, that he covenanted to pay the rent to I. S.; that the power was not pursued by a lease in the name of the attorney, for it ought to have been in the name of the principal. The court gave judgment for the defendant, observing that in a good lease the rent might no doubt be reserved to a stranger who was not a party to the deed, but not in the present case, where the deed was void; that the deed being void, so as not to pass any interest in the land, it was but just that it should be void as to the reservation of rent, especially where the covenant was not *with the plaintiff*, and where the rent was not reserved to her (c).

(x) See now 17 & 18 Vict. c. 104.

(y) *Kerrison v. Cole*, 8 East, 231.

(z) *Gaskell v. King*, 11 East, 165. See *Fuller v. Abbott*, 4 Taunt. 105.

(a) *Brewster v. Kitchell*, Salk. 198.

(b) *Andrew v. Pearce*, 1 N. R. 158.

(c) *Frontin v. Small*, Str. 705.

IV. *Of particular Express Covenants.*

1. *For Title*, p. 423.
2. *Not to Assign without Licence*, p. 429.
3. *To Repair*, p. 434.
4. *To Insure*, p. 435.

1. *Covenants for Title* are frequently termed real covenants, and run with the land: see *ante*, p. 408. The covenants for title usually entered into by the vendor, on a conveyance in fee, are four in number (*d*), viz., 1st. That he has good right to convey; 2nd. For quiet enjoyment; 3rd. For freedom from incumbrances; 4th. For further assurance.

Where in covenant against the executors of J. W. the declaration stated that J. W. granted land, &c., to the plaintiff in fee, and after warranting the land, &c., against *himself and his heirs*, covenanted that he was, notwithstanding any act *by him* done to the contrary, lawfully seised in fee simple, *and that he had full right and power, &c., to convey the same*, and that the plaintiff should quietly enjoy without interruption *from himself or any person claiming under him*; and, lastly, that he, his heirs, or assigns, and *all persons claiming under him*, should make further assurance; and assigned a breach, that J. W. *had not* at the time of making the indenture, &c., good right, power, &c., to convey or assure the premises in manner aforesaid. It was held, that the intervening general words, "full right, power, &c., to convey," were either part of the preceding special covenant, "that he was, notwithstanding any act *by him* done to the contrary, &c., seised in fee:" or if not, that they were qualified and restrained by all the other special covenants to the acts *of himself and his heirs* (*e*). So where the defendant, the assignor of a term, covenanted with his assignee that *he* had done no act to encumber the premises assigned, and that notwithstanding any *such* act the lease was a subsisting lease, and that he had good right to assign the premises *in manner aforesaid*; it was held, that the covenant was qualified and restrained to the assignor's acts only (*f*).

Covenant for quiet enjoyment during a term "without the interruption of J. M., his executors, &c., or *any other person or persons* whomsoever, claiming any estate in the premises, *and that* freely discharged, or otherwise by J. M., his heirs, executors, &c., defended and indemnified from all former gifts, grants, &c. made *by J. M. or by their or either of their acts, &c.*," preceded by a covenant that the lease was a good lease, notwithstanding any

(*d*) The covenant for title, viz., "that the vendor is seised in fee," is now usually omitted, being, in fact, comprehended in that for good right to convey. See Sugd. V. & P. 487 (13th ed.)

(*e*) *Browning v. Wright*, 2 B. & P. 13; acc. *Stannard v. Forbes*, 6 A. & E. 589.

(*f*) *Poord v. Wilson*, 8 Taunt. 543. See *Barton v. Fitzgerald*, 15 East, 529.

act of *J. M.*, and followed by a covenant for further assurance by *J. M.*, *his executors, &c.*, and all persons whomsoever claiming any estate in the premises *under him or them*. It was held, that the covenant for quiet enjoyment extended only against the acts of the covenantor and those claiming under him, and not against the acts of all the world, for that, to construe it in the larger sense, would be inconsistent with the other covenants, especially the first (*g*).

But where the defendants covenanted that, notwithstanding any act *by them* done to the contrary, *they* were seised of the land conveyed in fee; *and also*, that *they*, notwithstanding any *such* matter or thing as aforesaid, had good right to grant the premises; *and likewise*, that the plaintiff should quietly enjoy the same without the disturbance of them, “their heirs or assigns, *or for or by any other person or persons whatsoever*; and that the plaintiff should be indemnified *by them and their heirs* against all other incumbrances whatsoever, except the chief rent payable to the lord of the fee; it was held, that the general words of the covenant for quiet enjoyment were not necessarily to be restrained by the language of the antecedent covenants for title and right to convey; although those covenants were certainly of a limited kind, and provided only against the acts of the defendants. Lord *Ellenborough*, C. J., (who delivered the opinion of the court), observed: —“The covenant for title and the covenant for right to convey, are indeed what are somewhat improperly called synonymous covenants; they are, however, connected covenants, generally of the same import and effect, and directed to one and the same object; and the qualifying language of the one may therefore properly enough be considered as virtually transferred to and included in the other of them. But the covenant for quiet enjoyment is of a materially different import, and directed to a distinct object. The covenant for title is an assurance to the purchaser, that the grantor has the very estate in quantity and quality which he purports to convey, *viz.* in this case an indefeasible estate in fee simple. The covenant for quiet enjoyment is an assurance against the consequences of a defective title, and of any disturbances thereupon. For the purpose of this covenant, and the indemnity it affords, it is immaterial in what respects, and by what means, or by whose acts, the eviction of the grantee or his heir takes place: if he be lawfully evicted, the grantor, by such his covenant, stipulates to indemnify him at all events. And it is perfectly consistent with reason and good sense, that a cautious grantor should stipulate in a more restrained and limited manner for the particular description of title which he purports to convey, than for quiet enjoyment.”—The C. J. added:—“I do not find any case in which it is held that the covenant for quiet enjoyment is all one with the covenant for title, or parcel of that covenant, or

in necessary construction to be governed by it, otherwise than as, according to the general rules for the construction of deeds, every deed (as was said by *Hobart*, C. J., *Winch*, Rep. 93, *Sir George Trenchard v. Hosleins*) is to be construed according to the 'intention of the parties, and the intents ought to be adjudged of the several parts of the deed, as a general issue out of the evidence; and intent ought to be picked out of every part, and not out of one word only.' Consistently, therefore, with that case, and with every other that I am aware of, we are warranted in giving effect to the general words of the covenant for quiet enjoyment; and which are entitled to more weight in this case, inasmuch as they immediately follow and enlarge the special words of covenant against disturbance by the grantors themselves; and to restrain the generality of these words, thus immediately preceded by express words of a narrower import, would be a much stronger thing than to restrain words of like generality by an implied qualification arising out of another covenant where no such general words occurred. The person using the general words could not forget that he had immediately before used special words of a narrower extent. If the covenant containing both the special and general words stood by itself, there would be no pretence for refusing effect to the larger words; and if this could not be done in favour of express words of a narrower import in the same covenant, I cannot possibly understand upon what ground it should be done in favour of implied words of narrower import, which occur in another separate covenant, addressed, as has been before said, to a distinct object" (*h*).

Where a lessor covenanted with his lessee for quiet enjoyment, without disturbance by the lessor, "or any other person lawfully claiming or to claim, by, from, or under him;" it was held, that an entry and seizure of the goods on the premises, by the collector of land-tax, for arrears due from the lessor before the demise, was not a proceeding within the terms of the covenant (*i*). Where the lessor covenanted for quiet enjoyment without let, suit, &c. by him, "or any person claiming under him," and at the time of the lease was possessed of the equity of redemption only in the demised premises, and subsequently the mortgagee gave notice to the lessee to pay rent to him, and the lessee, on finding his lease defective, gave up possession, it was held, that there was an eviction, or at all events a molestation of the lessee, within the terms of the covenant, by a person claiming under the lessor (*k*).

If the purchaser of lands sells them, and afterwards takes a reconveyance from his vendee, with a covenant for a good title, he

(*h*) *Howell v. Richards*, 11 East, 633; *acc. Young v. Raincock*, 7 C. B. 310; and see *per Park, J.*, *Nind v. Marshall*, 1 B. & B. 319.

(*i*) *Stanley v. Hayes*, 3 Q. B. 105. See *Spencer v. Marriott*, 1 B. & C. 457.

(*k*) *Carpenter v. Parker*, 27 L. J., C. P. 78.

may, notwithstanding, maintain an action against the original seller on his covenant for a good title (l).

A general covenant for quiet enjoyment does not extend to tortious entries by a stranger (m). In the Year Book, 26 Hen. VIII. 3 b, is the following case:—A man made a lease for years by indenture, and by a clause in that lease covenanted to warrant the demised premises during the time of the lessee; afterwards the lessee was ousted by one who had not any right to the premises; and the question was, whether the lessee should have writ of covenant against the lessor or not: and *Englefield, J.*, said, “the lessee shall not have writ of covenant against his lessor where he is ousted by wrong, for he may have writ of trespass; or *ejectione firmæ* against him who ousted him; but if he was ousted by one who had title paramount against him, as in that case he cannot have any remedy [against the person ousting him], he may have writ of covenant against the lessor by force of the warranty: *quod fuit concessum per plusors*” (n).

The doctrine laid down in the foregoing case is not confined to covenants in leases for years, for (o) it has been adjudged, that a general covenant in a conveyance of lands in fee, that the grantor had legal title, and that the grantee might peaceably enjoy the premises without the interruption of the grantor and his heirs, or any other person, did not extend to the acts of wrong-doers; but only to the acts of persons claiming by a legal title.

The distinction taken in these cases illustrates the reason of the following rule, *viz.* that in actions for breach of a general covenant for quiet enjoyment, it is essentially necessary that it should appear on the face of the declaration, that the eviction was made by a person claiming by a legal title (p). It is sufficient, however, to allege that at the time of the demise to the plaintiff, one — had lawful right and title to the premises, and, having such lawful right and title, entered and ejected the plaintiff (q); and it is not necessary to set forth the title of the party evicting more particularly (r). Although, however, it be not necessary to set forth the particulars of the title of the party evicting, yet room should not be left for any intendment, that such title is derived from the plaintiff; for where the defendant granted land to plaintiff for years, and warranted the same against all men during the term; in an action of covenant on this warranty, the breach assigned was, that one S., after the commencement of the term, and during the term, having lawful right and title to the premises, entered and ejected plaintiff;

(l) *Goodere v. Lamb*, B. R. Trin. 37 Geo. III. Dampier MSS. L. I. L., L. P. B. 186.

(m) *Davie v. Sacheverell*, 1 Roll. Abr. Condition, (V.) pl. 7; *Hayes v. Bickerstaff*, Vaug. 119.

(n) See also 26 Hen. VIII. 3 b, pl. 11;

F. N. B. 342 (4to ed.)

(o) *Dudley v. Folliott*, 3 T. R. 584.

(p) *Tisdale v. Sir W. Essex*, Hob. 34.

(q) *Foster v. Pierson*, 4 T. R. 617.

(r) *Hodgson v. The East India Company*, 8 T. R. 278.

after verdict for plaintiff, it was moved, in arrest of judgment, that the breach was not well assigned; because S. might have had, at the time of his entry, a lawful right and title to the premises under the plaintiff himself; and as it was not stated in the declaration, that S. had title to the premises *before* the grant, it should be intended, that he had a right to the premises, at the time of his entry, by a puisne title, to which the covenant of defendant did not extend. The court held, that the breach was not well assigned (s).

This intendment, *viz.* that the title of the party evicting was derived from the plaintiff, may be precluded by averring, (if the facts of the case warrant it,) that the person evicting entered by lawful title, which accrued to him *before* the date of the conveyance to the plaintiff (t), or by averring that at the time of the demise to the plaintiff, the party evicting had lawful title (u); or that the party evicting entered by virtue of a title made *by* the defendant (x), or lawfully *claiming* under the defendant (y).

The preceding remarks have been confined to the cases of general covenants and evictions by strangers; but in cases where the covenant is particular, as against interruption by the grantor or lessor, or by any person expressly named; upon the eviction of the covenantee by the grantor or lessor, or by the person expressly named, it is not necessary for the plaintiff to aver lawful title in the party evicting. The declaration stated that the defendant granted a messuage with the appurtenances to the plaintiff in fee, and covenanted for quiet enjoyment, without the lawful let, &c. of the defendant; assigning for breach, that the defendant hindered the plaintiff in the enjoyment of a pew appurtenant to the messuage; on demurrer it was objected, that the injury complained of ought to be the subject of an action of trespass, but could not be the foundation of this action, the covenant being against all *lawful* disturbance; to this it was answered, that, where the breach complained of was the act of the covenantor, any interruption was sufficient to support this action against him. Judgment for the plaintiff; *Ashhurst, J.*, observing, that it was not necessary that the party against whom the action was brought should *have* a title; it was sufficient if he did the act under a *claim* of title; that in this case the act itself asserted a title; for the defendant locked up the pew, which was as strong an assertion of right as could well be imagined (z).

So where the plaintiff set forth a covenant, which recited that the defendant had sold, to the plaintiff's testator, goods which had been seized by one B., and therefore defendant covenanted to plaintiff's testator, to save him harmless from any costs or damages

(s) *Wotton v. Hele*, 2 Wms. Saund. 177. See 15 & 16 Vict. c. 76, s. 143.

(t) As in *Buckly v. Williams*, 3 Lev. 325.

(u) As in *Foster v. Pierson*, 4 T. R. 617.

(x) As in *Hodgson v. East India Company*, 8 T. R. 278.

(y) As in *Young v. Raincock*, 7 C. B. 310.

(z) *Lloyd v. Tomkies*, 1 T. R. 671.

relating to such seizure, and then assigned for breach, that the said B. had seized the goods *under pretence* of a debt due from defendant to him, touching which seizure testator was put to great expense, which defendant neglected to pay. It was objected, that the covenant did not extend to tortious acts, for which the plaintiff had a remedy, and therefore the title of B. ought to have been set forth; that "having lawful title" was not sufficient; that here it was only said "under pretence," which was not so strong. The counsel for the plaintiff admitted it to be a general rule, that the plaintiff must show a title in the disturber; but insisted that the rule extended only to the case of a general covenant, and not where it was particular against the acts of particular persons; for in that case it comprehended even tortious acts. And by the court: This pretence of B.'s being recited in the covenant, shows it was meant as a security against it in all events: and though it should be tortious, yet being particular, it falls within the distinction that has been well taken. Judgment for plaintiff (a).

The result of the foregoing cases is, that "where a man covenants to indemnify against all persons, that is but a covenant to indemnify against lawful title. And the reason is, because, as it regards such acts as may arise from rightful claim, a man may well be supposed to covenant against all the world; but it would be an extravagant extension of such a covenant, if it were good against all the acts which the folly or malice of strangers might suggest; and, therefore, the law has properly restrained it within its reasonable import, that is, to rightful title. It is, however, different when an individual is named; for, there, the covenantor is presumed to know the person against whose acts he is content to covenant, and may, therefore, be reasonably expected to stipulate against *any* disturbance from him, whether by lawful title or otherwise." Hence where the condition of a bond, which recited the purchase of land by plaintiffs, was, to save them and the land harmless from all manner of mortgages, judgments, &c., obtained by T. T. or any other person; it was held to bind the obligor against the wrongful entry of T. T. (b).

Tenant for life, and his eldest son the remainderman in tail, leased to S., for ninety-nine years, and gave S., who was acquainted with their title, a bond, conditioned for the due observance of their covenant for quiet enjoyment. S. underlet to W., and covenanted with W. against eviction by any person claiming under him, or by his acts, *neglect, default*, or procurement. The tenant for life and his eldest son being dead without issue, W. was evicted by the next remainderman in tail. It was held, that no breach could be assigned on the covenant; for, first, the eviction was not by any person claiming under S., but by title paramount; secondly, it did

(a) *Perry v. Edwards*, 1 Str. 400.

(b) *Nash v. Palmer*, 5 M. & S. 374; and see *Fowle v. Welsh*, 1 B. & C. 29.

not appear to be an eviction arising from the acts or procurement of S. ; lastly, although the eviction would have been prevented if S., at the time he took the lease, had required the lessors to cut off the entail, and the lessors had complied with such requisition, yet, inasmuch as S. had no means of compelling the lessors to cut off the entail, it could hardly be said that he was guilty of any *neglect* or *default* in not procuring that step to be taken, which he was unable to compel (c). A. covenanted for himself, his heirs, and assigns, that B. should quietly enjoy, without the let of A., his heirs, or assigns, or any person claiming under him or them. The estate originally belonged to A.'s wife, and on marriage was settled on A. for life, with power to make leases, and also with power to A. and his wife jointly to revoke the uses, which they did ; and after A.'s death, B. was evicted under the new settlement. It was held that covenant lay against the executors of A., though the estate moved from the wife and not from A. (d). An action may be maintained on a covenant for quiet enjoyment, if the lessor has not any title, although the lessee has not entered (e) ; but in the case of a lease to commence at a future day, the action cannot, it seems, be brought before the time when the possession under the lease was to commence (f).

A covenant by lessor, that the lessee, paying the rent, &c., shall quietly enjoy, is not a conditional covenant, making the payment of the rent a condition precedent to the performance of the covenant for quiet enjoyment, on the part of the lessor (g). A covenant for quiet enjoyment is broken by the lessor so working a vein of iron-stone, lying over a seam of coal, demised by him to the plaintiff, that the roof of the coal mine falls in (h).

2. Of the Covenant not to Assign without Licence.

A covenant not to assign or under-let without licence of the lessor, with a clause of re-entry in case of breach, is frequently introduced into leases, for the purpose of securing to the lessor a responsible tenant in whom he can repose a confidence (i), upon a bill filed for the specific performance of an agreement by a landlord to grant a lease of a public-house, containing the *common* and *usual* covenants ; Lord *Thurlow*, C., was of opinion, that though the covenant not to assign without licence might be a very usual one, where a brewer or vintner let a public-house, that would not make it a *common* covenant ; and declared, that the landlord was not entitled to have it inserted in the lease. Lord *Kenyon*, C. J.,

(c) *Woodhouse v. Jenkins*, 9 Bingh. 431.

(d) *Hurd v. Fletcher*, B. R. M. 19 Geo. III. ; B. P. B. 85 ; Dampier, MSS. L. I. L.

(e) *Ludwell v. Newman*, L. P. B. 76 ; Dampier's MSS. L. I. L. ; 6 T. R. 458.

(f) *Ireland v. Burcham*, 2 B. N. C. 90.

(g) *Dawson v. Dyer*, 5 B. & Ad. 584. See *Doe v. Kennard*, 12 Q. B. 244. But see *Ireland v. Burcham*, per *Tindal*, C. J.

(h) *Shaw v. Stenton*, 27 L. J., Exch. 253.

(i) In *Henderson v. Hay*, 3 Bro. C. C. 632.

held such a covenant to be a *fair* and *usual* covenant (*k*). The opinion of Lord *Thurlow* was recognized by Lord *Eldon*, C. (*l*); but Sir *W. Grant*, M. R. (*m*), held, that under an agreement for a lease "with usual covenants," the lessor was not entitled to this covenant against assigning or under-letting without licence (*n*).

"The general principle is, that a lessee may assign his interest in the term (*o*). But the lessor may restrain the lessee from assigning by covenant or proviso; and if the lessor grants the term subject to a condition, that it shall cease, if the lessee assigns, an assignment by the lessee will be void. But if the lessor restrain the lessee from assigning by covenant only, although the lessee by assigning commits a breach of covenant, yet the assignment itself is not void" (*p*).

A covenant not to assign or otherwise put away the lease of the premises thereby demised, without the licence of the lessor in writing, is not broken by an underlease (*q*). So where the covenant was not to assign or otherwise part with the premises, *or that present indenture of lease*: it was held, that a deposit of the lease with a creditor, as a security for money advanced, was not a breach (*r*). But where the words of the covenant were, that the lessee would not set, *let*, or assign over the whole or part of the premises without leave; it was held, that an underlease amounted to a breach (*s*). So where the proviso was, that the lease should be void if the lessee assigned the indenture of lease, or the demised premises, "for the whole *or any part of the term*, without leave in writing;" it was held, that the words included an underlease (*t*). And here it is to be observed, that a lease by the lessee for the whole term amounts to an assignment, although the rent be reserved to the lessee, and a power of re-entry given to him and not to the reversioner (*u*). But if a day only be excepted out of the term, then it is an underlease (*x*).

If a lease contain a proviso, making it void, if the lessee, his executors, or administrators, alien without licence in writing, a voluntary assignment by the executor, or administrator, without such leave, will amount to a forfeiture (*y*). Where one of the questions was, whether executors were warranted in disposing of a lease as assets of the testator, where there was a proviso against alienation by the *lessee*, but no mention of executors (*z*); Lord *Thurlow*, C., said, "If A. lets a farm to B., with a covenant not to

(*k*) *Morgan v. Slaughter*, 1 Esp. 8.

(*l*) *Church v. Brown*, 15 Ves. 258, 531.

(*m*) *Browne v. Raban*, 15 Ves. 529.

(*n*) And see *Bennett v. Womack*, 7 B. & C. 627; *Bell v. Barchard*, 16 Beav. 8.

(*o*) By 8 & 9 Vict. c. 106, s. 3, a lease required by law to be in writing, and an assignment of a chattel interest, not being copyhold, shall be void unless made by deed.

(*p*) *Per Holroyd, J., Paul v. Nurse*, 8 B. & C. 488.

(*q*) *Crusoe v. Blencowe*, 3 Wils. 234.

(*r*) *Doe v. Laming*, 1 R. & M. 36.

(*s*) *Roe v. Harrison*, 2 T. R. 427.

(*t*) *Doe v. Worsley*, 1 Campb. 20.

(*u*) *Palmer v. Edwards*, Doug. 186, n.

(*x*) *Holford v. Hatch*, Doug. 182.

(*y*) *Roe v. Harrison*, 2 T. R. 425.

(*z*) *Seers v. Hind*, 1 Ves. jun. 295.

alien, and B. dies, may not his executors dispose of the term? I think it has been determined that they may, and I have always taken it to be clear law. It is an alienation by the act of God. I remember Lord Camden entered into the question much in the same way. He took it to be clear law, that an alienation by death could not be a forfeiture. In the case of a lease for years to A., it goes to his executors, not by way of limitation, as in the case of a remainder over, &c., but it goes to them as coming in the place of the lessee. I understood it to be well settled as I have stated. But I do not mean to lay down, that a man may not by a clause in his will provide that, in case of a devolution to executors, it shall not be alienable by them; but it must be very special for that purpose" (a).

Provisoes for re-entry in a lease are to be construed, as other contracts, according to fair and obvious construction; and not with the strictness of conditions at common law (b).

An assignment by operation of law will not amount to a forfeiture. This point was decided in (c) a case in which it was held, that an assignment by the sheriff to a party purchasing under a *bonâ fide* execution, will not amount to a forfeiture. But where the execution is in fraud of the covenant, the assignment under it will amount to a forfeiture, and the lessor may re-enter; as where the lessee gives a warrant of attorney to confess judgment to a creditor for the express purpose of enabling such creditor to take the lease in execution under the judgment (d).

Covenant against assigning without licence is determined by a licence once granted (e). So under a condition not to alien without leave, if leave is once granted, the condition is entirely discharged (f).

C. C. College demised land for a term of years to A., with a condition, that neither A. nor his assigns should alien the land without the special licence of the lessors; afterwards the lessors, by writing under seal, licensed A. to alien the land to any person, and A. afterwards assigned the term to B.: after B.'s death, C. became entitled to the term, and assigned it to the defendant Syms. The lessors entered for condition broken. It was resolved by the court, that the alienation by licence to B. had determined the condition as to the assignees; and that it was not in the power of the lessors to dispense with an alienation for one time, and yet to consider the estate aliened or demised as afterwards remaining subject to the condition; for a condition was to be taken strictly, and by the alienation with licence it was satisfied (g). So in the case of a demise to A., B., and C., with a like condition, if a licence to alien was granted to A., and A. aliened by virtue of such licence, it was held

(a) And see *per Ashhurst, J.*, in *Roe v. Harrison*; *per Gibbs, J.*, in *Lloyd v. Crispe*, 5 Taunt. 249.‡

(b) *Per Lord Tenterden, C. J.*, *Doe v. Elsam*, 1 M. & M. 189.

(c) *Doe v. Carter*, 8 T. R. 57.

(d) *Ibid.* 8 T. R. 300. See *Croft v. Lumley*, 5 E. & B. 648.

(e) 12 Ves. 191, *per Sir W. Grant*.

(f) See *Platt on Covenants*, 425-6.

(g) *Dumpor's case*, 4 Rep. 119, b.
"The profession have always wondered

that the condition was determined as to B. and C. (*h*). So in the case of a demise upon a like condition, if the lessee aliened part, with the assent of the lessor, the lessee might alien the residue without such assent (*i*). The rule in *Dumpor's* case has, however, ceased to be law with reference to covenants and conditions in leases, and to waivers and licences of such conditions and covenants occurring after the passing of the 22 & 23 Vict. c. 35, and the 23 & 24 Vict. c. 38. The 1st section of the 22 & 23 Vict. c. 35, preserves the condition or right of re-entry in all respects as if the licence had not been given, except in respect of the particular matter authorised to be done; and the 2nd section confines the operation of the licence given to one of several lessees or co-owners, or given in respect of part only of the property, to the particular lessee or co-owner, or the particular part of the property, leaving the right of re-entry in force in respect of all shares or interests or property not the subject of the licence. The 6th section of the 23 & 24 Vict. c. 38, confines an actual waiver of the benefit of any covenant or condition in any lease on the part of any lessor, to the instance or breach to which such waiver shall specially relate, and prevents it from being a general waiver unless an intention to that effect shall appear.

Lessee covenanted, that he would not demise the premises without licence; the lessee became a bankrupt; his assignees took to the lease, and assigned it to A., who assigned it to the original lessee, who underlet to B.; it was held, that the covenant of the lessee was discharged by 49 Geo. III. c. 121, s. 19 (the words of which section are substantially the same as the Bankrupt Act, 12 & 13 Vict. c. 106); and, consequently, that the subsequent under-letting by the lessee was no breach of that covenant, which no longer existed (*k*). The last-mentioned act, sect. 145, provides for three cases: 1st, where the assignees accept the conveyance or lease (*l*); in which case the bankrupt is not liable to pay any rent accruing after the date of the fiat or filing of the petition, or to be sued in respect of the subsequent non-performance of any of the covenants; 2ndly, where the assignees decline the same; in this case also the bankrupt is not liable, in case he deliver up the conveyance or lease to the conveyor or lessor within fourteen days after he shall have had notice that the assignees have declined; in this case the covenants on both sides fall to the ground (*m*). It has been held, however, that this is a personal discharge to the lessee only, and that a surety who has joined in the lease with him is liable for breaches of covenant, accruing between the date of

at *Dumpor's* case, but it has been law so many centuries that we cannot now reverse it." Per *Mansfield*, C. J., in *Doe v. Bliss*, 4 Taunt. 736.

(*h*) *Leeds v. Crompton*, cited 4 Rep. 120, a.

(*i*) Per *Popham*, C. J., 4 Rep. 120, a.

(*k*) *Doe v. Smith*, 5 Taunt. 795.

(*l*) The assignees are not liable unless they do some act which unequivocally indicates their election. *Goodwin v. Noble*, 27 L. J., Q. B. 204.

(*m*) *Kearsey v. Carstairs*, 2 B. & Ad. 716.

the commission and the actual delivery up of the lease by the lessee under the statute; the term remaining vested in the bankrupt till election by the assignees (*p*), or delivery up of the lease to the lessor under the statute (*q*). And where the original lessees had assigned to B., subject to the payment of rent, who entered, and afterwards became bankrupt, and rent became due after the commission, and the assignees of B. declined the lease; and then covenant for the rent was brought by the lessor against the original lessees; it was held, that the action might be maintained; for "if before the statute, there had been an assignment of the lease, and the lessors had accepted rent, they might, notwithstanding, have proceeded by covenant against the lessees; *the privity of contract not being destroyed*. The statute (6 Geo. IV. c. 16, s. 75) makes no difference in this respect; it contemplates the case of a bankrupt lessee only, not of an assignee of the term. The statute operates only as a personal discharge of the bankrupt; for it does not say that the lease and the covenants shall be at an end, but merely that the bankrupt lessee shall not be liable to be sued in respect of any subsequent non-observance of the covenants" (*r*). *3rdly*, where the assignees do not, upon request, elect whether they will accept or decline; in which case, the Lord Chancellor has power, upon petition, to order the assignees to elect and to deliver up the conveyance or lease and possession of the premises.

Whether the licence to assign was general, as in *Dumpor's case*, or particular, as "to one particular person, subject to the performance of the covenants in the original lease," yet the condition was gone, and the assignee might assign without a licence (*s*). But where there is an exception out of the original restriction to alien in favour of an assignment in a particular manner, *e. g.* by will, and an assignment is made by the lessee by will; and then his executors make another assignment, not by will, it seems that this last assignment is bad (*t*).

Acceptance by the lessor of rent due *after* condition broken with notice, is, generally speaking, a waiver of the forfeiture (*u*), as a binding election on the part of the lessor to treat the lease as valid (*x*); but such a receipt is not, it seems, *necessarily* a waiver (*y*).

Where there has been a breach of the covenant for several years, a jury may presume a licence in writing (*z*).

(*p*) *Tuck v. Fyson*, 6 Bingham 321.

(*q*) *Briggs v. Sowry*, 8 M. & W. 729.

(*r*) *Manning v. Flight*, 3 B. & Ad. 211.

(*s*) *Brummell v. Macpherson*, 14 Ves. 173, *Eldon, C.*

(*t*) *Lloyd v. Crispe*, 5 Taunt. 249, *per Gibbs, J.*

(*u*) *Goodright v. Davids*, Cowp. 804;

Whitcomb v. Fox, Cro. Jac. 398. See *Doe v. Bliss*, 4 Taunt. 735, *ante*, p. 432.

(*x*) See *Jones v. Carter*, 15 M. & W. 718.

(*y*) *Doe v. Batten*, Cowp. 243. See *Croft v. Lumley* (Dom. Proc.), 27 L. J., Q. B. 322.

(*z*) *Gibson v. Doey*, 27 L. J., Ex. 40.

A court of equity will not relieve against a forfeiture occasioned by breach of covenant not to assign (a).

3. Of the Covenant to Repair (b).

The lessee of a house, on a general covenant to repair during the term, is bound to rebuild, in case the house be consumed by an accidental fire (c). If a lessor covenant that he will, in case the demised premises be burned down, rebuild, and replace the same in the same state they were in before the fire, he is only bound to rebuild what he let, and not any additional parts, which may have been erected by the lessee (d).

On a covenant to erect a bridge in a substantial manner, and to uphold and keep in repair for a certain time, although the bridge be broken down by an extraordinary flood, yet the party covenanting is bound to repair (e). Where the lessor of a house covenanted with the lessee to repair all the *external* parts of the premises, and the corporation pulled down an adjoining house, leaving the wall of the demised house exposed and without support, and thereupon the wall fell down and the house became uninhabitable, and the lessee sued the lessor upon his covenant; it was held, that the external parts of premises are those which form the inclosure of them, and beyond which no part extends: and that it was immaterial whether those parts are exposed to the atmosphere or rest upon some other building which forms no part of the premises let; and that the defendant was liable on his covenant, though the injury to the wall was done in the first instance by the corporation (f).

A covenant to keep and leave a house in repair, is satisfied by keeping it in substantial repair, according to the nature of the building; and with a view to determine the sufficiency of the repair, the jury may inquire whether the house was new or old at

(a) *Per Lord Eldon, C., in Hill v. Barclay*, 18 Ves. 63; and see generally as to relief in equity against breaches of covenant, *Job v. Bannister*, 2 K. & J. 374; *Elliott v. Turner*, 13 Sim. 477.

(b) If the plea be that defendant did repair, the plaintiff begins at the trial. *Doe v. Rowlands*, 9 C. & P. 613. The measure of damages is not the amount that would be required to put the premises in repair, but the amount to which the reversion is injured by the premises being out of repair. *Ibid.* See *Davies v. Underwood*, 27 L. J., Exch. 113. Where the lessor has no reversion, but both he and his lessee have been evicted by title paramount, the former measure of damages would seem to be correct. *S. C.*

(c) *Bullock v. Dommitt*, 6 T. R. 650. In many cases an exception of accidents by fire or tempest is introduced into leases for the protection of lessees. It appears, from the cases of *Monk v. Cooper*, and *Hare v. Groves*, 3 Anstr. 687, that this exception should be introduced into the covenant for repairs, in order to exempt the lessee from the obligation of paying rent as well as of rebuilding, in case the house should be destroyed by fire or tempest. See *Shep. Touch.* 169-173.

(d) *Loader v. Kemp*, 2 C. & P. 375.

(e) *Brecknock Canal Company v. Pritchard*, 6 T. R. 750. See *Shubrick v. Salmon*, 3 Burr. 1637.

(f) *Green v. Eales*, 2 Q. B. 225.

the time of the demise (*g*). So where the covenant was to keep the premises in good and tenantable repair, and to surrender them at the end of the term in like tenantable condition, reasonable wear and tear excepted: *Tindal*, C. J., said the meaning of such a covenant was well understood to be good and tenantable repair, regard being had to the state of the premises in point of age. The landlord is not to have, at the end of the term, a new house at the tenant's expense. The *general* state and condition of the premises at the time of the demise may be shown (*h*), so as to measure the amount of damages for want of repairs, by reference to that state; a house in Spitalfields may be repaired with materials inferior to those requisite for repairing a mansion in Grosvenor Square (*i*). The same nicety of repair is not exacted for an old building as for a new one (*k*). And where a lessee covenants to keep old premises in repair, he is not liable for such dilapidations as result from the natural operation of time and the elements (*l*). Where the agreement was "to put premises into habitable repair," *Alderson*, B., said, "It is difficult to suggest any material difference between the term 'habitable repair,' used in this agreement, and the more common expression 'tenantable repair:' they must both import such a state, as to repair, that the premises may be used and dwelt in, not only with safety, but with reasonable comfort, by the class of persons by whom, and the sort of purposes for which, they were to be occupied (*m*)."

Where by an *agreement* for a lease of premises, to be made as soon as a licence could be obtained from the lord of the manor, the defendant covenanted to keep the premises in repair during the term, and there was a covenant by the plaintiff for quiet enjoyment; defendant entered, and occupied the premises during the term: it was held, that he was liable on the covenant to repair, though no lease had ever been made to him pursuant to the agreement, nor any licence obtained from the lord for that purpose (*n*).

4. Of the Covenant to Insure.

In every lease, containing a covenant to insure against loss by fire, it should be stipulated that the money to be recovered from

(*g*) *Stanley v. Towgood*, 3 B. N. C. 4. Hence a covenant in the same words may be substantially different in effect, as in the case of an original lessee of a new house for 100 years, and his underlessee who enters after 50 years of the term have expired, when the house is an old house. *Per Parke*, B., *Walker v. Hatton*, 10 M. & W. 256, 257. See *Minshull v. Oakes*, 27 L. J., Exch. 194.

(*h*) *Young v. Mantz*, 6 Sc. 277.

(*i*) *Per Alderson* and *Parke*, BB., *Payne v. Haine*, 16 M. & W. 541. From a yearly tenancy, the only agreement

that can be implied on this head is, to keep wind and water-tight. *Auworth v. Johnson*, 5 C. & P. 239.

(*k*) *Mantz v. Goring*, 4 B. N. C. 453.

(*l*) *Gutteridge v. Munyard*, 1 M. & Rob. 334.

(*m*) *Belcher v. M'Intosh*, 2 M. & Rob. 186.

(*n*) *Pistor v. Cator*, 9 M. & W. 315. He would be also (*semble*) in such a case liable on an implied assumpsit. *Richardson v. Giffard*, 1 A. & E. 52; *Bolton v. Tomlin*, 5 *ibid.* 856.

the insurance office shall be laid out in restoring the premises ; and a covenant containing such a stipulation will run with the land. And where the premises are situated within the limits mentioned in the Party-wall Act (14 Geo. III. c. 78), the effect of which act is to enable the landlord by applications to the governors or directors of the insurance office to have the sum insured laid out in rebuilding the premises : a covenant to insure is a covenant running with the land ; for, connecting that covenant with the act of parliament, the landlord has a right to say, that the money, when recovered, shall be so laid out. It is, therefore, as compulsory on the tenant to have the money laid out in rebuilding, and as beneficial for the landlord, as if the tenant had expressly covenanted that he would lay out the money to be received in respect of the policy upon the premises (*p*).

Lessee covenanted, that he and his assigns would insure the demised premises and keep them insured during the term, and deposit the policy with the lessor ; it was held, that the true construction of this covenant was, not that the lessee should effect one policy, and keep that policy on foot, but that the lessee and his assigns should always keep the premises insured by some policy or another ; and that it was a breach, if they were uninsured at any one time, and a continuing breach for any portion of time that they remained uninsured (*q*). Of such a covenant a neglect to insure for five weeks and two days after the execution of the lease is (if unexplained) a breach (*r*). So if the covenant be to insure in the names of the lessors, and the lessee add his own (*s*). So if it be to insure and continue insured in the lessor's and lessee's name, and the lessee omit his, even although the lessor on a former occasion had approved of such omission and accepted rent (*t*).

If a lease contains a covenant by the tenant to keep the premises in repair, and a covenant to insure them for a specific sum against fire ; on their being burnt down, the tenant's liability on the former covenant is not limited to the amount of the sum to be insured under the latter (*u*).

Formerly a court of equity would not afford any relief by injunction against a forfeiture for breach of a covenant to insure (*x*) ; but now both the courts of common law and equity afford relief against forfeiture for not insuring.

The Common Law Procedure Act, 1860, s. 2, gives, in case of ejectment for forfeiture for non-insuring, to the court, or a judge, power upon rule or summons to give relief in a summary way, in all cases in which such relief may now be obtained in the court of

(*p*) *Vernon v. Smith*, 5 B. & Ald. 1. 368.

(*q*) *Doe v. Peck*, 1 B. & Ad. 428. See
Doe v. Laming, 4 Campb. 73.

(*r*) *Doe v. Ulph*, 13 Q. B. 204.

(*s*) *Penniall v. Harborne*, 11 Q. B.

(*t*) *Doe v. Gladwin*, 6 Q. B. 953.

(*u*) *Digby v. Atkinson*, 4 Campb. 275.

(*x*) *White v. Warner*, 2 Mer. 459

Green v. Bridges, 4 Sim. 96.

chancery, under "*An Act to further amend the law of Property, and to Relieve Trustees*," and upon such terms as would be imposed in such court.

The last-mentioned act, the 22 & 23 Vict. c. 35, has the following important sections :

Sect. 4 : "A court of equity shall have power to relieve against a forfeiture for breach of a covenant or condition to insure against loss or damage by fire, when no loss or damage by fire has happened, and the breach has, in the opinion of the court, been committed through accident or mistake, or otherwise, without fraud or gross negligence, and there is an insurance on foot at the time of the application to the court, in conformity with the covenant to insure, upon such terms as to the court may seem fit."

Sect. 6 : "The court shall not have power, under this act, to relieve the same person more than once in respect of the same covenant or condition, nor shall it have any power to grant any relief, under this act, where a forfeiture under the covenant, in respect of which relief is sought, shall have been already waived out of court in favour of the person seeking the relief (x)."

Sect. 8 : "Where on the *bond fide* purchase, after the passing of this act, of a leasehold interest, under a lease containing a covenant on the part of the lessee to insure against loss or damage by fire, the purchaser is furnished with the written receipt of the person entitled to receive the rent, or his agent, for the last payment of rent accrued due before the completion of the purchase, and there is subsisting at the time of the completion of the purchase an insurance in conformity with the covenant, the purchaser, or any person claiming under him, shall not be subject to any liability by way of forfeiture or damages, or otherwise, in respect of any breach of the covenant committed at any time before the completion of the purchase ; but this provision is not to take away any remedy which the lessor, or his legal representatives, may have against the lessee, or his legal representatives, for breach of covenant."

Sect. 9 : "The preceding provisions shall be applicable to leases for a term of years absolute or determinable on a life or lives, or otherwise ; and also to a lease for the life of the lessee, or the life or lives of any other person or persons."

V. *By whom the Action of Covenant may be maintained.*

1. *By Heir*.—Covenants which run with the land will descend to the heir of the covenantee ; and he may sue for a breach thereof :—where, therefore, the lessee covenanted with the lessor, his executors and administrators, to repair, it was held, that the heir of the lessor, though not named, might have covenant against

lessee for not repairing (*y*). Plaintiff declared as heir on a covenant by lessee for years to repair, and assigned for breach, that the premises were out of repair for a period of time which included a portion of his ancestor's life; and on this ground an exception was taken in arrest of judgment, after verdict for the plaintiff; but it was overruled; *Holt*, C. J., observing, that "if the premises were out of repair in the time of the ancestor, and continued so in the time of the heir, it was a damage to the heir; and the jury may give as much in damages as would put the premises in repair; but hereby no damages are given in respect of the length of time they continued in decay, but in respect to what it will cost at the time of action brought, to put the premises in repair" (*z*). Upon a covenant with A. and his heirs for further assurance upon request, and a request made by the ancestor in his lifetime to levy a fine, and a neglect so to do, the ancestor not being evicted in his life, but the heir being evicted afterwards, the heir may maintain an action upon the request of the ancestor; because the ultimate damage had not accrued in the life of the ancestor (*a*).

2. *By Executor*.—A. and B. his wife demised lands to C. for twenty-one years, and covenanted, that they would, at the end of twenty-one years, make a good lease to C. and his assigns for twenty-one years, commencing at the expiration of the first term. During the first term, the lessee died, having appointed D. his executrix, who entered, and died, having appointed the plaintiff her executor, who entered. At the expiration of the first term, A. and B. having refused to grant the further lease, an action was brought by the plaintiff (as executor of D., executrix of C. the lessee), on this covenant, against A. the husband; and it was adjudged that the action would well lie. The reasons of the judgment are not mentioned in the report; but it appears to have been decided on the ground that the plaintiff, being executor of D., who was executrix of C. the lessee, was, as such, entitled to the benefit of his covenant (*b*).

Covenant by the plaintiff as executor of J. S. The defendant sold lands to J. S., and covenanted with him, his heirs and assigns, that he should enjoy the lands against all persons claiming under one A.; and the breach assigned was, that B. and C. in the lifetime of the testator, entered claiming under A. It was contended that the covenant was with J. S., his heirs and assigns, touching an estate of inheritance; and, therefore, that the action ought to have been brought by the heir or assignee, and not by the executor; but it was resolved by the court, that the eviction being of the testator in his lifetime, he could not then have an

(*y*) *Lougher v. Williams*, 2 Lev. 92.

(*z*) *Vivian v. Campion*, Salk. 141.

This is not, however, the true criterion of damage in such a case as this, *ante*,

p. 435.

(*a*) *King v. Jones*, 5 Taunt. 418; (*in error*), 4 M. & S. 188.

(*b*) *Chapman v. Dallon*, Plowd. 284.

heir or assignee of the land, and therefore that the damages belonged to the executor, though not named in the covenant; for he represented the person of the testator (c). But where the plaintiff as executrix declared that the defendant conveyed to her testator certain land in fee (subject to redemption), and covenanted with the testator, his heirs and assigns, that he was seised in fee, and had good right to convey, assigning for breach that the defendant was not seised, &c.; it was held, that the executrix could not maintain this action without showing some special damage to the testator in his lifetime, or that the plaintiff claimed some interest in the premises (d). The plaintiff, being devisee in fee, sued afterwards in that character, stating as damage, that the premises were thereby of much less value than they would have been, and that she had been prevented from selling them at so large a price as she otherwise would; and it was held, that the action was maintainable (e). The cases of *Kingdon v. Nottle*, and *King v. Jones*, have decided, that where there are covenants real, that is, which run with the land and descend to the heir, though there may have been a formal breach in the ancestor's lifetime, yet if the *substantial damage* has taken place since his death, the real representative and not the personal is the proper plaintiff. But where the covenant is merely collateral, as where the lessee covenanted not to fell timber trees, excepted out of the demise, the executor of the lessor may maintain an action for a breach in the lifetime of the testator (f). And where the covenant is a continuing one, as, for instance, to repair (the breach of which of itself imports damage), the executor may, it seems, sue for the damage accruing in his testator's lifetime (g); and the heir for the subsequent damage (h).

Lessee for years demised for a term longer than his own, the under-lessee covenanting to pay rent to the lessee; it was held, that the executor of the lessee might sue the under-lessee for rent accruing during the continuance of the term, not as assignee of the reversion, but on the privity of contract; for the deed operated as a demise, and the covenant was for a payment in the nature of rent (i). Executors, though not named, may sue on a covenant made with testator, in reference to a chattel (k).

3. *By Assignee*.—Assignee of part of the reversion of the land demised, *e. g.* for life or years, may take advantage of the covenants contained in an indenture of demise; for he is an assignee within the 32 Hen. VIII. c. 34 (l). But the grantee of the whole estate in reversion, in *part* of the thing demised, is not within the

(c) *Lucy v. Levington*, 2 Lev. 26.

(d) *Kingdon v. Nottle*, 1 M. & S. 355.

(e) *Ibid.* 4 M. & S. 53.

(f) *Raymond v. Fitch*, 2 C. M. & R.

588.

(g) *Ricketts v. Weaver*, 12 M. & W.

718.

(h) *Vivian v. Campion*, Salk. 141.

(i) *Baker v. Gostling*, 1 B. N. C. 19.

(k) *Doe v. Rogers*, 2 N. & M. 550.

(l) 1 Inst. 215 a.; *Matures v. Westwood*, Cro. Eliz. 599.

meaning of the statute ; as if the reversioner in fee of four acres grants two acres in fee, the grantee cannot enter, because *conditions* cannot be apportioned by act of the party (*m*). But *covenants* may (*n*), and covenant will lie by the assignee of the reversion of part of the demised premises against the lessee for not repairing such part (*o*).

As the assignee of a term is bound by covenants which run with the land, so he may take advantage of them (*p*). If a man demise or grant land to a woman for years, and covenant with her to repair the houses during the term, and the woman marries and dies, the husband shall have an action of covenant as well on the covenant in law upon the words "demise or grant," as upon the express covenant (*q*). The law is the same with respect to tenants by statute merchant, or statute staple or elegit, of a term, and he to whom a lease for years is sold by force of any execution shall have an action of covenant in such case as a thing annexed to the land, although they come to the term by act of law (*r*). So the executor of B., the executor of A., is entitled to the benefit of a covenant made with A. and his assigns, for he is the assignee in law of A. (*s*). The word *assignee* comprehends the assignee of the assignee, the executors of the assignee of the assignee, and the assignee of the executor or administrator of the assignee (*t*). But covenant does not lie by an assignee for a breach done before his time (*u*). A mortgagee died possessed of the residue of a mortgage term, subject to the usual proviso of its being determined on payment of the money on a given day ; the money was not paid at the day, and afterwards the mortgagee died, having bequeathed the money to the plaintiff by will, and appointed him his executor : it was held, that the plaintiff could not sue in covenant as assignee of the term, because this was a personal covenant, collateral, and not running with the land, and because it was broken in the lifetime of the testator (*x*).

32 Hen. VIII. c. 34.—By the common law no grantee or assignee of the reversion could take advantage of a re-entry by force of any condition (*y*). And "no stranger to any covenant could take advantage thereof, but only such persons as were parties or privies thereunto" (*z*) ; but the 32 Hen. VIII. c. 34 (*a*), enacts :—That all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, of any lands or other

(*m*) *Lee v. Arnold*, 4 Leon. 27.

(*n*) *Twynnam v. Pickard*, 2 B. & Ald. 105.

(*o*) *Ibid. Acc. Badeley v. Vigurs*, 4 E. & B. 71.

(*p*) *Hyde v. Dean of Windsor*, Cro. Eliz. 553.

(*q*) The word grant does not now imply a covenant in law, 8 & 9 Vict. c. 106, s. 4, *ante*, "Of Implied Covenants."

(*r*) *Spencer's case*, 5 Rep. 17, 5th Res.

(*s*) *Chapman v. Dalton*, *ante*, p. 438.

(*t*) *Spencer's case*, 7th Res.

(*u*) *Lewes v. Ridge*, Cro. Eliz. 883.

(*x*) *Canham v. Rust*, 2 Moore, 164.

(*y*) 1 Inst. 215, a.

(*z*) See the preamble, and 1 Wms. Saund. 240, n. 3.

(*a*) The statute does not extend to covenants upon estates tail. 1 Inst. 215, a.

hereditaments, or of any reversion of the same, which belonged to any of the monasteries, &c., and all other persons being grantees or assignees to or by the king, or to or by any other person than the king, their heirs, executors, successors, and assigns, shall have like advantages against the lessees, their executors, administrators, and assigns, by entry for non-payment of the rent, or for doing waste or other forfeiture, and, by action only, for not performing other conditions, covenants, or agreements contained in the leases or grants, against the said lessees and grantees, their executors, administrators, and assigns, as the said lessors and grantors themselves, their heirs or successors, might have had. By sect. 2, all lessees and grantees of land or other hereditaments, for terms of years, life or lives, their executors, administrators, or assigns, shall have like action and remedy against all persons and bodies politic, their heirs, successors, and assigns, having any gift or grant of the king, or of any other person, of the reversion of the same lands and hereditaments so letten, or any parcel thereof, for any condition or covenant contained in their leases, as the same lessees might have had against the said lessors and grantors, their heirs and successors.

This statute applies to leases by deed only, and where a lease is not under seal, the assignee of the reversion cannot maintain *assumpsit* against lessee for breach of his contract with the assignor to repair (*b*).

The first section of the above statute gives to the assignee of the reversion two remedies: one, by entry for non-payment of rent, doing waste, or other forfeiture; and the other, by action, for not performing other conditions, &c.; and as the remedy by *entry*, according to the construction, 1 Inst. 215, b, is confined to forfeitures by force of such conditions only, as are either incident to the reversion (*e. g.* the payment of rent), or for the benefit of the estate (*e. g.* to repair); so it hath been resolved, that the remedy by *action* is confined to the breaches of such covenants as relate to the thing demised, and not to collateral covenants (*c*). And on this ground, where the mortgagor and mortgagee of a term made an under-lease, in which the covenants for the rent and repairs were with the mortgagor and his assigns only; it was held, that the assignee of the mortgagee could not maintain an action for the breach of these covenants; because they were not covenants running with the land, but collateral covenants, being entered into with the mortgagor, who has only an equity of redemption, and is (in law) a stranger to the land (*d*).

If the estate in reversion, in respect of which the condition or covenant was made, be extinguished, the condition or covenant is

(*b*) *Standen v. Christmas*, 9 Q. B. 135.

(*c*) *Spencer's case*, 5 Rep. 18, a.

(*d*) *Webb v. Russell*, 3 T. R. 393; and

see *Wootton v. Steffenoni*, 12 M. & W. 129;
Doe v. Ongley, 10 C. B. 25.

also extinguished: as where a lease was made for 100 years, and the lessee made an under-lease for twenty years, rendering rent, with a clause of re-entry; and afterwards the original lessor granted the reversion in fee, and the grantee purchased the reversion of the term; it was held, that the grantee should not have either the rent, or the power of re-entry; for the reversion of the term, to which they were incident, was extinguished in the reversion in fee (*e*). But now by 8 & 9 Vict. c. 106, where the reversion of any land expectant on a lease shall be surrendered or merge, the estate, which shall confer as against the tenant under the lease the next vested right to the land, "shall, to the extent and for the purpose of preserving such incidents to, and obligations on, the same reversion, as but for the surrender or merger thereof would have subsisted, be deemed the reversion expectant on the same lease" (*f*).

Tenants in common of a reversion may maintain covenant against the assignee of the term for the recovery of arrears of rent, although it should appear that at time of action brought the reversion was out of the plaintiffs, they having granted it over after the rent became due (*g*). A grantee of the reversion of copyhold lands is within the equity of the statute, 32 Hen. VIII. c. 34, which is a remedial law (*h*). And the grantee of land, subject to a term in an incorporeal hereditament therein, *e.g.* the right to dig for and take minerals, &c., is also within the statute, for in reality the relationship of reversioner and owner of a particular estate exists between them (*i*). A remainderman is an assignee of the reversion within the statute. Devise to A. for life, remainder to B. for life, &c., with power to lease. A. leases for a term under the power, and the lessee covenants with the lessor, his heirs and assigns, for payment of the rent to the lessor, and to such other person as should be entitled to the freehold, &c. A. dies pending the term, and after the death of A., rent becoming in arrear, B. brings covenant. Held, that it would lie; for B. is, within the meaning of the statute, an assignee of the reversion of that estate out of which the lease is granted (*k*). And this is so, even although the person leasing under the power, *e.g.* the tenant for life, have an equitable estate only (*l*). But where J. B., being seised in fee, conveyed to defendant and T. J., their heirs and assigns, to the use that J. B., his heirs and assigns, might take to his use a rent certain to be issuing out of the premises, and subject

(*e*) Moore, 94, pl. 232, cited 3 T. R. 402, 403; see *Thorn v. Woolcombe*, 3 B. & Ad. 586.

(*f*) The 7 & 8 Vict. c. 76, which was in force from 31st December, 1844, to 1st October, 1845, contained a similar provision. Sect. 12.

(*g*) *Midgley v. Lovelace*, Carth. 289. See *Womersley v. Dally*, 26 L. J., Exch.

219.

(*h*) *Glover v. Cope*, 3 Lev. 326; Carth. 205. See *Whitton v. Peacock*, 3 Myl. & K. 325.

(*i*) *Martyn v. Williams*, 1 H. & N. 817.

(*k*) *Isherwood v. Oldknow*, 3 M. & S. 382.

(*l*) *Greenaway v. Hart*, 14 C. B. 340.

to the said rent, to the use of defendant, his heirs and assigns: and the defendant covenanted with J. B., his heirs and assigns, to pay to him, his heirs and assigns, the said rent, and to build one or more messuages on the premises, for better securing the rent: and J. B. demised the said rent to plaintiffs; it was held, that covenant would not lie at the suit of the plaintiffs for non-payment of the rent, or for not building the messuages, for here was neither privity of contract, nor privity of estate; the rent was reserved out of the original estate; the covenant was a covenant in gross (*m*).

Lessee for years assigns over his term by indenture to J. S., and covenants with J. S. and his assigns for quiet enjoyment; after which J. S. assigns over the term by parol, and the assignee being disturbed brought an action of covenant; and adjudged, that it well lies; although the assignment was not by writing, because the assignee was privy in estate (*n*). But by 29 Car. II. c. 3, s. 3, leases, estates, or interests, either of freeholds, terms of years, or any uncertain interest, cannot be assigned, unless by deed or note in writing, signed by the assignor or his agent, or by operation of law; and now by 8 & 9 Vict. c. 106, a lease of any tenements required by law to be in writing, and an assignment of a chattel interest, shall be void, unless made by deed.

A person to whom an apprentice is assigned, according to the custom of the city of London, cannot maintain covenant on the indenture of apprenticeship to which he is not a party; because custom cannot make an assignee, so as to entitle him to an action (*o*).

As an assignee of a lessee is charged in covenant for repairs, though assignees are not named, in respect of his having the possession; so an assignee of the reversion has an action of covenant for default of repairs in respect of his having the reversion, though assignees are not named in the covenant (*p*).

Tenants in common *may* join in covenant for repairs (*q*), but no case has decided that they must join (*r*). Hence an assignee of part only of the interest of the original lessee may sue upon a covenant to procure a renewal of letters patent, without joining the assignee of the remaining part; for they are tenants in common, having separate and distinct interests in the term, and the damages are, in their nature, severable, and may be apportioned by the jury according to the value of the share of each (*s*).

(*m*) *Milnes v. Branch*, 5 M. & S. 411.

(*n*) *Awder v. Nokes*, Cro. Eliz. 436.

(*o*) *Barker v. Beardwell*, 1 Show. 4.

(*p*) *Per cur.* in *Kitchen v. Buckley*, 1 Lev. 109; T. Raym. 80.

(*q*) *Kitchen v. Buckley*, 1 Lev. 109.

(*r*) *Per Tindal*, C. J., in *Simpson v. Clayton*, 4 B. N. C. 781; but see *Wallace v. McLaren*, 1 M. & Ry. 518, n., and *ante*, p. 419.

(*s*) *Simpson v. Clayton*, 4 B. N. C. 780.

VI. *Against whom the Action of Covenant may be maintained.*

1. *Against Heir*.—An action of covenant will lie against the heir on a covenant by his ancestor for himself and his heirs (*t*). It is not necessary to allege in the declaration, that the heir has lands by descent; but if the heir has not any lands by descent, he may insist on it by way of defence to the action (*u*).

In an action on a breach of covenant in a lease for quiet enjoyment, the declaration, after stating that the defendant's ancestors granted the lease in question, alleged, that the reversion vested in the defendant *by assignment*; the defendant pleaded, that the reversion did not vest in him *modo et formâ*; it appeared in evidence that the estate *descended* to the defendant as heir at law to the lessors; whereupon it was objected, that the reversion vested in the defendant *by descent*, and not *by assignment*. But the court was of opinion, that it was sufficient to prove the substance of the issue, which was, that the defendant was clothed with such a character as would make him liable on the covenant: and that was sufficiently proved by showing that the estate was vested in him; for whether he was in possession as assignee or heir at law, he was equally liable on this covenant (*x*).

2. *Against Executor*.—Executors and administrators are bound by the covenants of their testator or intestate, although they be not named; unless the covenants are such as in their nature determine by the death of the covenantor. It was said by the court in *Hyde v. Dean of Windsor*, Cro. Eliz. 553, that covenant lies against an executor in every case, although he be not named, unless it be such a covenant as is to be performed by the person of the testator, which the executor cannot perform. But a covenant by a testator to teach an apprentice his trade is binding on the executors, and they ought to see that the apprentice is taught his trade: if they are not of the same trade, they ought to assign him to another who is, so that he may be taught according to the covenant (*y*).

Executors and administrators may be sued as assignees (*z*); for they are assignees in law of the interest of the term (*a*); but an executor in such a case "may by proper pleading discharge himself from personal liability, by alleging that he is no otherwise assignee than by being executor, and that he has never entered or taken possession of the demised premises; and, as is well known, from all liability as executor, by alleging that the term is of no

(*t*) *Dyke v. Sweeting*, Willes, 585.

(*u*) See a form of plea, Lutw. 290.

(*x*) *Derisley v. Custance*, 4 T. R. 75.

(*y*) *Walker v. Hull*, 1 Lev. 177.

(*z*) *Tilney v. Norris*, Carth. 519.

(*a*) *Per Fleming*, C. J., 1 Bulstr. 28.

value, and that he has fully administered, &c." (b). Where covenant is brought against an executor, although the breach assigned be for default of reparation committed in the time of the executor, yet the judgment must be *de bonis testatoris*; for it is the covenant of the testator which binds the executor as representing him, and, therefore, he must be sued by that name (c). Where, however, an administrator had *entered and occupied* premises demised by indenture to the intestate, it was held, that a plea to an action of covenant for non-payment of rent, taxes and non-repair, stating that the premises yielded no profit, could not be supported (d); and in such a case the judgment would be *de bonis propriis* (e). The general rule is, that the executor of a lessee who enters is liable as assignee, except that, with respect to rent, his liability does not exceed what the property yields. No such exception applies to the covenant for repairs (f). By a lease, some print works, and certain articles, matters, and things on the premises, were demised with power to the tenant to replace any of the articles, &c. when worn out, and make any improvements in the works; and it was covenanted that at the end of the term a valuation of the articles and improvements should be made, and if they exceeded a certain sum, the landlord, his heirs, executors, administrators, and assigns, should pay the tenant the difference. The landlord died during the term, and appointed the defendant his executor, and devised to him the reversion in the premises and articles demised. It was held, in an action by the tenant against the executor of the landlord to recover the excess, that as this was a covenant relating to chattels it did not run with the reversion, and that the executor was only liable on it in his representative character; and that, as it appeared on the record that he was executor, the judgment should be, that the plaintiff do recover the debt and costs *de bonis testatoris*, if the defendant have so much, and if not, then, as to the costs, *de bonis propriis* (g).

3. *Against Assignee*.—1. If the covenant extends to a thing in esse, parcel of the demise, as a covenant, to repair (h), to reside constantly on the demised premises (i), to leave part of the land demised every year for pasture (k), to insure premises situated within the limits mentioned in the 14 Geo. III. c. 78, by which the landlord is enabled to have the sum insured laid out in rebuilding the premises (l), to supply the premises demised with a sufficient

(b) *Wollaston v. Hakewill*, 3 M. & G. 297, per Tindal, C. J.

(c) *Collins v. Throughgood*, Hob. 188.

(d) *Tremeere v. Morison*, 1 B. N. C. 89.

(e) *Wollaston v. Hakewill*, 3 M. & G. 297.

(f) *Per Bosanquet, J., Tremeere v. Morison*, *supra*; 4 M. & Sc. 615, S. C.

See *Hornidge v. Wilson*, 11 A. & E. 645.

(g) *Gorton v. Gregory*, 3 B. & S. 90; 31 L. J., Q. B. 302 (*in error*).

(h) *Dean of Windsor's case*, 5 Rep. 24, a.

(i) *Tatem v. Chaplin*, 2 H. Bl. 133.

(k) *Cockson v. Cock*, Cro. Jac. 125.

(l) *Vernon v. Smith*, 5 B. & Ald. 1.

quantity of good water at a certain rate per house (*m*), or the like, the thing to be done by force of the covenant is in a manner annexed and appurtenant to the thing demised: it is a parcel of the contract, and tends to the support of the thing demised: hence it shall bind the assignee, *although he be not named*; and the assignee by act in law, as tenant by elegit of a term, or he to whom a lease for years is sold by force of any execution, is equally bound with the assignee by act of the party (*n*). Where it is proved that A. is tenant, and that upon his quitting the premises B. takes possession, B. may, in the absence of evidence to the contrary, be presumed to have come in as assignee of A. (*o*).

2. If the covenant relates to a thing *not* in esse at the time of the demise, but to be done upon the thing demised, as a covenant to build a new wall upon the thing demised; it shall bind the assignee, *if named* (*p*).—Thus where a lease contained a demise of all mines and minerals then opened or discovered, or which might during the term be opened or discovered, under certain lands, and also all smelting mills then standing upon the lands, with full liberty to sink shafts there, and to build thereon any mills or other buildings requisite for working the mines; and the lessor afterwards granted his reversion to A., who by will devised the same to the plaintiffs; it was held, that the covenant to build the new smelting mill (which was implied from the language of the deed) tended to the support and maintenance of the thing demised, and that the assignee of the reversion might therefore sue upon it (*q*). But a covenant to repair the demised premises, and all other buildings which might *thereafter* be erected during the term, *i.e.*, substantially, a conditional covenant to repair them *if* erected, runs with the land and binds the assignee, although he be not named (*r*).

3. If the covenant relates to a thing merely collateral to and not in any respect concerning the thing demised, as a covenant to build a house on the land of the lessor which is not parcel of the demise; or to pay any collateral sum to the lessor, or to a stranger; the assignee, *though named*, is not bound by such covenant; because the thing covenanted to be done is merely collateral, and not in any respect touching or concerning the thing demised (*s*). In order to bind the assignee, even though named, it is essentially necessary, that the thing covenanted to be done, or not to be done, should directly affect the nature, quality or value of the thing demised, or the mode of occupying it. Hence, where

(*m*) *Jourdain v. Wilson*, 4 B. & Ald. 286.

(*n*) 6th Res. *Spencer's case*, 5 Rep. 17, b.

(*o*) *Doe v. Murless*, 6 M. & S. 110; *Doe v. Williams*, 6 B. & C. 42.

(*p*) *Spencer's case*, 2nd Res.; but see *Minshull v. Oakes*, 27 L. J., Ex. 194,

and notes to *Spencer's case*, 1 Smith, L. C.

(*q*) *Sampson v. Easterby*, 9 B. & C. 505; (*in error*) 6 Bingh. 644, S. C.

(*r*) *Minshull v. Oakes*, 27 L. J., Exch. 194.

(*s*) *Spencer's case*; and see *Mayho v. Buckhurst*, Cro. Jac. 438.

in a lease of land, with liability to make a water-course, and erect a mill, the lessee covenanted for himself and his assigns not to hire persons to work in the mill who were settled in other parishes, without a certificate of their settlement; it was held, that this covenant was not binding on the assignee of the term: because the state of the thing demised would be the same at the end of the term, whether the parish were more or less burdened with poor; and although the value of the reversion would not be so great if the poor's rate were increased, yet that burden would be increased by a collateral circumstance: and, the work to be done being the same, whether it were done by workmen from one parish or another, could not affect the mode of occupation (t).

4. If a covenant relates to personal goods, as on a demise of sheep for a certain time, if the lessee covenants for himself and his assigns to re-deliver the sheep at the end of the time, and the lessee assign the sheep over, this covenant will not bind the assignee, *though named*, because there is not any privity (u). "The covenant in this case is not collateral, but the parties, that is, the lessor and assignee, are total strangers to each other, without any line or thread to unite and tie them together, and to constitute that privity which must subsist between debtor and creditor to support an action." *Per Wilmot, C. J. (x)*. In the case of realty there subsists a privity between the lessor, and the lessee and his assigns, in respect of the reversion; but in the case of a lease of personal goods, there is not any reversion, but merely a chose in action in the personalty, which cannot bind any but the covenantor, or his personal representative. "To carry the lien of a personal obligation over to an assignee, and to make him the object of an action at the suit of a person with whom he did not originally contract, *he must in all cases be named*, and there must *also* be a privity between the assignee and the person to whom he becomes engaged; and the covenant must respect the thing leased. The chose in action, which of itself is not assignable, loses that property under those circumstances, and in a waiting dependent state follows its principal; and assignees of leases become liable to assignees of reversions, and *vice versa*." *Per Wilmot, C. J. (y)*.

A lessee of tithes covenanted for himself and his assigns not to let any of the farmers occupying the estate out of which the tithes arose have any part of the tithes without the consent of the lessor; the lessee assigned to the defendant, who suffered several of the farmers to retain part of the tithes without the lessor's consent; it was contended, that an action would not lie against the defendant, inasmuch as the covenant was merely personal and collateral,

(t) *Mayor of Congleton v. Pattison*, 10 East, 130.

(u) *Spencer's case*, 3rd Res.

(x) In *Bally v. Wells*, Wilmot, 345.

(y) *Ibid*.

binding the lessee only; that tithes were incorporeal, lying in grant, and would not, therefore, endure such an annexation of covenant to them. But the court were of opinion, that there was not any difference between land and tithes as to the annexation of covenants; that this covenant was not a mere collateral covenant, but related to the thing demised, materially and essentially tending to preserve it, and as such obligatory on the assignee being named, and there being a privity in respect of the reversioner, the lessor (z). Covenant by lessee against the assignees of lessor. The lessee covenanted to leave all the trees he should plant during the term. The lessor covenanted for himself, his executors and administrators, to pay for the trees at a fair valuation, by two persons to be named by each party, or their respective executors. The term expired. The defendants, assignees of lessor, refused to name an arbitrator, which was the breach assigned. On demurrer, it was held, that the covenant to refer to arbitration did not run with the land; and therefore the assignees were not bound by it, on the authority of *Spencer's case* (a). So where a term is granted as a security for money lent on mortgage, the covenant in the mortgage deed to pay the money on a given day is a personal and collateral covenant not running with the land (b).

Where lands are conveyed by A. to B. in fee, to the use of such person as C. shall appoint, and C. covenants for himself and his assigns to pay to A. a fee farm rent for the lands, and afterwards C., in pursuance of his power, makes an appointment to D.; D. the appointee cannot be sued on the covenant as the assignee of C.; for the appointee has not the estate of C., but is in by the original conveyance from A. (c). A covenant which runs with the land, *e. g.* a covenant to repair, is divisible; and will bind the assignee of parcel of the estate demised, *quoad* the repairs of such parcel (d). So where covenant was brought by the lessor against the assignee of the lessee for the non-payment of a year's rent; for the condition of the assignee is different from that of the lessee, who is chargeable on the privity of contract, whereas the assignee is chargeable on the privity of the estate, and in respect of the land; hence the rent is apportionable; on the same principle as the rent of the lessee or assignee would be in an action of debt or replevin (e).

Where the lessee of a public-house covenanted for himself, his executors, and assigns, with his lessors (brewers), to take all his beer of them or their successors *in their said trade*; and the lessors sold their trade and the public-house, with other premises, to third persons, who removed the plant, &c., to a distance of two miles, and there carried on the business of brewers, it was held

(z) *Bally v. Wells*, 3 Wils. 25.

(a) *Grcy v. Cuthbertson*, 4 Doug. 351.

(b) *Canham v. Rust*, 2 Moore, 164.

(c) *Roach v. Wadham*, 6 East, 289.

(d) *Congham v. King*, Cro. Car. 221.

(e) *Stevenson v. Lambard*, 2 East, 575.

that the trade of the lessors was thereby determined; and that their assignee could not take advantage of the covenant, on the assignee of the lessee purchasing beer from another brewer (*f*).

An assignee of a term is not answerable for the breach of such covenants as were broken by the lessee before he became assignee, as where lessee covenanted to rebuild within such a time, and failed to do so, and then, after the expiration of the time, assigned (*g*). Neither is he answerable for such breaches of covenant as are committed after he has assigned over the thing demised (*h*); for if an action be brought against him charging him with such breaches, he may plead, that before the breach was incurred, he assigned all his estate and interest in the thing demised to J. S. (*i*), and this will be a good discharge; and it is not necessary to show that the lessor had notice of such assignment (*k*). An assignee cannot, by assigning before action brought, defeat an action for breaches of covenant running with the land, and incurred in his time, the right of action being complete, and vested before the assignment (*l*). So an action lies against an assignee for breaches committed in his time, although the lease has been determined by the re-entry of the lessor under a condition to that effect, and that thereupon the lessor should have the premises again "as if the indenture had never been made" (*m*). And if the lessor sue the original lessee on the privity of contract for breaches committed in the time of the assignee, the lessee may maintain an action founded in tort against the assignee, for having neglected to perform the covenants during the time he continued assignee, whereby the lessee

(*f*) *Doe v. Reid*, 10 B. & C. 849.

(*g*) *Grescot v. Green*, Salk. 199; *Churchwardens of St. Saviour's v. Smith*, 3 Burr. 1271; 1 Bl. R. 351, S. C.

(*h*) *Chancellor v. Poole*, Doug. 764.

(*i*) An assignment to a beggar or a person leaving the kingdom, provided the assignment be executed before his departure, is good, nor will such assignment be considered as fraudulent, although the assignee never takes possession. *Taylor v. Shrum*, 1 B. & P. 21. See also *Lekeux v. Nash*, Str. 1221, and *Odell v. Wake*, 3 Campb. 394. A fraudulent assignment is as no assignment at all; in that case, both at law and in equity, the act is altogether void; but it is a mistake to call an assignment to a beggar a fraudulent assignment. If a party assign nominally only, retaining the beneficial possession all the time, it is fraudulent, because, whilst he assumes to do one thing, he really does another; he retains the benefit, and by a false act endeavours to get rid of the burthen. But if he assigns really, getting rid of

the burthen, and giving up really the benefit also (if any) to his assignee, it is not a fraudulent act. His motive for parting with it, or the other's motive for receiving it, are not enough to make it fraudulent, if the act done be a real act, intended really to operate as it appears to do. *Per Alderson, B.*, in *Fagg v. Dobie*, 3 Y. & C. 103. See also the remarks of Lord *Cottenham, C.*, on the right of an assignee to relieve himself from the obligations of a lease, in *Rowley v. Adams*, 4 M. & Cr. 534. An assignment to a feme covert, where husband has not refused his consent, is sufficient; for a feme covert is of capacity to purchase of others without the consent of her husband; and though he may disagree and divest the estate, yet, if he neither agree nor disagree, the purchase is good. *Barnfather v. Jordan*, Doug. 451.

(*k*) *Pitcher v. Tovey*, Salk. 81.

(*l*) *Harley v. King*, 2 C. M. & R. 18.

(*m*) *Hartshorne v. Watson*, 4 B. N. C. 178.

sustained damage (*n*), upon the ground that, during the continuance of the interest of the assignee, there is a duty on his part to pay the rent and perform the covenants (*o*). Where an assignee takes an assignment of leasehold premises, subject to the payment of the rent and the performance of the covenants contained in the lease, he is not liable in covenant for the rent which the lessee has been compelled to pay after he (the assignee) has assigned over (*p*).

From the above cases it may be collected, that an assignee, in order to exonerate himself from his liability under the covenants in a lease, must convey *all* his estate and interest in the thing demised. If the conveyance falls short of this, it will not amount to an assignment, so as to discharge the assignee from his liability (*q*).

It is not necessary that the assignee should have entered. Hence a mortgagee of a lease by assignment is liable on the covenant for rent, though he has never in fact occupied (*r*). The assignees of a bankrupt lessee, however, are not liable for rent arrear where they have not taken possession of the thing demised (*s*), nor done some act to manifest their assent to the assignment as it regards the term, and their acceptance of the estate, rents, &c. (*t*); for they are not bound to take possession of a *damnosa hæreditas*, that is, property of the bankrupt, which, so far from being valuable, would be a charge to the creditors. The assignees may take to the bankrupt's property or not, according as it is or is not beneficial to the creditors; and consequently they may do such previous acts as are necessary to ascertain whether the property be beneficial or not, before they take to it (*u*). Hence, where defendants, assignees of a bankrupt lessee, advertised the lease for sale by auction, in which advertisement they did not state that the premises belonged to them, nor for or by whom they were to be sold, but only generally that there was a saleable term, and no bidder offering, they declined interfering any further with the property; and it did not appear that they had ever taken possession, either actually or by receiving or paying any rent; it was held, that there was not sufficient evidence of any assent by them to accept the bankrupt's term, so as

(*n*) *Burnett v. Lynch*, 5 B. & C. 589.
See *Walker v. Bartlett*, 18 C. B. 845;
Hancock v. Caffyn, 8 Bingh. 358.

(*o*) *Wolveridge v. Steward*, 1 C. & M.
644. See *Walker v. Hatton*, 10 M. & W.
249.

(*p*) *Wolveridge v. Steward*, 1 C. & M.
644.

(*q*) *Walker v. Reeves*, Doug. 461, n.

(*r*) *Williams v. Bosanquet*, 1 B. & B.
238; *Burton v. Barclay*, 7 Bingh. 745.

(*s*) *Bourdillon v. Dalton*, Peake's N.
P. C. 238.

(*t*) *Copeland v. Stevens*, 1 B. & Ald.
593.

(*u*) That the same rule applies to assignees in trust for the benefit of creditors, see *Carter v. Warne*, 4 C. & P. 191; *contra*, *How v. Gough*, 3 A. & E. 659. That it applies to the assignees of insolvents, *Lindsay v. Limbert*, 2 C. & P. 526.

to render them responsible for the performance of the covenants in his lease (x).

"The result of the various cases upon this subject is, that the assignees of the bankrupt are not liable as assignees of the term, unless they have done some act which *unequivocally* indicates to the lessor that they have elected to take the benefit of the lease. No general rule can be laid down as to the effect of remaining in possession of the demised premises, or paying rent for them, or doing any other act consistent with the supposition that the assignees have not elected to take the lease as part of the property of the bankrupt, for the benefit of the creditors. Each case must be determined by the peculiar circumstances belonging to it." *Per* Lord Campbell, C. J. (y). Where, therefore, the assignees took possession of an hotel, but only for the purpose of keeping the bankrupt's furniture and goods which were upon the premises, and closed the house; paid, and submitted to a distress for, rent, but protested that it was done to save the furniture and effects from being sold; kept the tap of the hotel open by a third party, but for the purpose of preserving the licence; and an action of ejectment having been brought against them, said they would resist it, but the action had been commenced *before* the goods were removed, so that all they might have meant was, perhaps, that the ejectment would not succeed; it was held, that they were not liable on the covenant in the lease (z). So where the assignees, on an application to them by the plaintiff, positively refused to accept the lease, although they had previously so far dealt with it, as to release an under-tenant (a). But if they put up a lease to sale, and accept a deposit from the purchaser, they are liable, unless they show the contract rescinded (b). So where they interfere in the management of a farm (c).

This question of election by the assignees has, however, in a recent case been declared to be inapplicable to the present Bankruptcy Law. Vice-Chancellor Stuart, in this case (d), held, that by ss. 141 and 142 of the Bankruptcy Act of 1849, a bankrupt is, by force of his adjudication, divested of whatever leasehold or freehold property he may be possessed of, and that it becomes absolutely vested in the assignees. But that they are not bound to keep a *damnosa hereditas*, and the 145th section gives them

(x) *Turner v. Richardson*, 7 East, 335.

(y) *Goodwin v. Noble*, 27 L. J., Q. B. 204.

(z) *Goodwin v. Noble*. But see *Hanson v. Stephenson*, 11 B. & Ald. 303, where it seems however that the assignees carried on the bankrupt's trade.

(a) *Hills v. Dobie*, 8 Taunt. 325.

(b) *Hastings v. Wilson*, Holt, 290.

(c) *Thomas v. Pemberton*, 7 Taunt. 206; *Welch v. Myer*, 4 Campb. 368. If

assignees take possession with a view to a beneficial occupation, they are liable upon a tenancy from year to year, until it is terminated, the same as upon a lease. *Ansell v. Robson*, 2 C. & J. 610.

(d) *Cartwright v. Glover*, 2 Giff. 620. These sections do not seem to have been mentioned in *Goodwin v. Noble*. See *Bishop v. Trustees of Bedford Charity*,

9 L. J., Q. B. 53.

power to renounce, but until they elect to renounce, the estate remains in them. *Sed quære.*

As the assignee, to exonerate himself from liability, must convey all his estate in the demised premises, so the whole interest in the original lease must be conveyed, in order to make a person chargeable as assignee, as will appear from the following cases:—

Lessee for lives of a messuage, under a covenant to keep and deliver up in repair, conveyed all his estate and interest therein to A. and his executors, to hold the same for ninety-nine years if the *cestui que vie* should so long live, in as large, ample, and beneficial way as the grantor, his heirs, &c., held the same, paying a certain rent to the reversioner. On the expiration of the lives, the reversioner brought covenant against the executors of A. for not yielding up the messuage in repair. It was held that the action would not lie; Lord *Kenyon*, C. J., observing, that there were not any words in the indenture, by which the freehold, of which the original lessee was seised, was conveyed to the testator of the defendants: that the conveyance of all the grantor's estate and interest to a man and his executors, for years, could not convey a freehold; that such words meant only their interest, &c. in the legal estate thereby granted; and that the court could not give those words a larger operation than the parties themselves had declared they should have (*e*). So where in covenant for rent arrear, brought against the defendant as *assignee* of J. S., it appeared in evidence, that by the deed, under which the defendant held, the premises were conveyed to him by J. S. for a day or some days less than the original term, the court were of opinion, that the action could not be maintained, the defendant being an under-lessee, and not an assignee of the whole term (*f*). The devisee of an *equitable* estate is not liable as assignee (*g*). But where a lessee for years granted *the whole of the term* to J. S.; it was held that J. S. might maintain an action as assignee of the term against the lessor for a breach of covenant; although in the deed of assignment, the rent was reserved to the lessee, with a power of re-entry in case of non-payment, and although new covenants were introduced into that deed (*h*).

A. demised to B. for a term, B. covenanting for payment of rent, and not to assign without the consent of A. The term vested by assignment in C., who, upon being sued for non-payment of rent, pleaded, that before the rent became due, he had assigned to D. A. replied the covenant not to assign; but the replication was held bad, on the ground that the assignment itself was not void

(*e*) *Earl of Derby v. Taylor*, 1 East, 502.

(*f*) *Holford v. Hatch*, Doug. 183.

(*g*) *The Mayor of Carlisle v. Blamire*, 8 East, 487.

(*h*) *Palmer v. Edwards*, Doug. 186, n.

(although a breach of covenant), and as soon as C. ceased to be assignee, his obligation to perform the covenant was at an end (*i*).

In declaring against an assignee, it is not incumbent on the lessor to set forth mesne assignments; it is sufficient to state, generally, that all the estate, &c., of the lessee vested in the defendant by assignment; for it cannot be presumed that the lessor is acquainted with the particulars of the assignee's title (*k*).

4. *Against Devisee*.—By 11 Geo. IV. & 1 Will. IV. c. 47, s. 3, in the cases mentioned in that Act (see *post*, tit. "Debt") creditors may maintain debt or covenant (*l*), against the heirs and devisees, or devisees of such devisees, jointly. And by the 4th section, if there is not any heir-at-law, the creditor may bring debt or covenant against the devisee solely (*m*).

VII. Of the Declaration.

Venue, p. 453.

As to the Statement of the Deed and its Provisions, p. 454.

Dependent Covenants and Conditions Precedent, p. 455.

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Venue.—The principle upon this subject is as follows. Where the action is founded on privity of contract, it is transitory, and the venue may be laid in any county; but where the action is founded upon privity of estate only, it is local, and the venue must be laid in the county where the estate lies. Hence it is transitory in actions of Lessor *v.* Lessee; Lessee *v.* Lessor; Assignee of Reversion *v.* Lessee (*n*); Lessee *v.* Assignee of Reversion; in the two latter cases the privity of contract being transferred by the operation of the 32 Hen. VIII. c. 34. It is local in actions of Lessor *v.* Assignee of Lessee (*o*); Assignee of Lessee *v.* Lessor; Assignee of Reversion *v.* Assignee of Lessee (*p*); Assignee of Lessee *v.* Assignee of Reversion. If the locality does not appear on the declaration, and no issue is raised on it, the defendant is not entitled to a nonsuit, by reason of the venue being laid in a wrong county (*q*).

The circumstance of rent being made payable in a different county from that in which the lands lie, will not affect the locality of an action of covenant for non-payment of such rent (*r*). Where,

(*i*) *Paul v. Nurse*, 8 B. & C. 486.

(*k*) *Pitt v. Russell*, 3 Lev. 19.

(*l*) Under the 3 & 4 Will. & Mary, c. 14, an action of debt only lay. *Wilson v. Knubley*, 7 East, 128.

(*m*) Under the 3 & 4 Will. & Mary, c. 14, a specialty creditor could not recover against a devisee if there was no heir.

Hunting v. Sheldrake, 9 M. & W. 256.

(*n*) *Thursby v. Plant*, 1 Wms. Saund. 237.

(*o*) *Stevenson v. Lambard*, 2 East, 575.

(*p*) *Barker v. Damer*, Carth. 182.

(*q*) *Boyes v. Hewetson*, 2 B. N. C. 575.

(*r*) *Barker v. Damer*, Salk. 80.

however, the action is local, although it be brought and tried in a wrong county, yet the defect will be aided after verdict, by 16 & 17 Car. II. c. 8 (s). And by 3 & 4 Will. IV. c. 42, s. 22, reciting, that unnecessary delay and expense is sometimes occasioned by the trial of local actions in the county where the cause of action has arisen, it is enacted that "in any action depending in any of the superior courts, the venue in which is by law local, the court in which such action shall be depending, or any judge of any of the said courts may, on the application of either party, order the issue to be tried, or writ of inquiry to be executed, in any other county or place than that in which the venue is laid; and for that purpose any such court or judge may order a suggestion to be entered on the record, that the trial may be more conveniently had or writ of inquiry executed, in the county or place where the same is ordered to take place." Such an application, however, cannot be made till after issue joined (t). The Common Law Procedure Act, 1852, allows (sect. 41) "the joinder of different causes of action in the same suit, provided they be by and against the same parties and in the same rights, and where two or more of the causes of action so joined are local and arise in different counties, the venue may be laid in either of such counties," the court or a judge having power in such a case to order separate trials if expedient.

As to the statement of the Deed and its provisions.—It should appear on the face of the declaration, that defendant covenanted by deed; such an omission being ground of error (u); and if the deed be lost, an allegation to that effect should be made, as, upon the issue of *non est factum*, secondary evidence of the deed would not, it seems, in default of such an allegation, be admissible (x). *Profert* and *oyer* are no longer necessary, 15 & 16 Vict. c. 76, s. 55; but it is provided by sect. 56, that "a party pleading in answer to any pleading in which any document is mentioned or referred to, shall be at liberty to set out the whole or such part thereof as may be material, and the matter so set out shall be deemed and taken to be part of the pleading in which it is set out."

Every deed is supposed to be executed the same day that it bears date. But though the deed appear on the face of it to have been made, that is, written on one day, yet if in truth it were delivered on a subsequent day, that may be shown by averment (y). A declaration stated that the deed was *indented, made, and con-*

(s) *Mayor of London v. Cole*, 7 T. R. 583.

(t) *Bell v. Harrison*, 2 C. M. & R. 733.

(u) *Moore v. Jones*, Str. 814. See 15 & 16 Vict. c. 76, Sched. B. Form 24.

(x) *Smith v. Woodward*, 4 East, 585.

In *Hendy v. Stephenson*, 10 East, 55, it was held (on special demurrer) necessary in pleading a lost deed, to state the supposed date of, and names of the parties to it.

(y) *Stone v. Bale*, 3 Lev. 348; *acc. Browne v. Burton*, 5 D. & L. 289.

cluded on a day subsequent to the day on which the deed itself was stated on the face of it to have been indented, made, and concluded; it was held, that such allegation was no more inconsistent with the deed, than if it had been alleged that it was sealed and delivered on a day subsequent; that it was quite immaterial when it was *indented*, and equally so when it was *made*, by which might be understood when it was written; the only material word was *concluded*, and a deed could only be said to be *concluded* when it was delivered. The time of *delivery* was the important time when it took effect as a deed: and from the case of *Stone v. Bale*, it appeared that the delivery might be after the date (z).

In framing the declaration, it is not necessary to set forth the provisions of the deed in its very words (a); though this is not unusual where the legal construction of the deed is doubtful. It is sufficient to state its substance and legal effect. Neither is it necessary to set forth *all* the provisions of the deed; stating such parts as are necessary to entitle the plaintiff to recover will be sufficient (b). Hence in covenant on a mortgage deed, the court were of opinion, that it was sufficient for the plaintiff to set forth in his declaration, that the defendant, by a certain indenture, had demised the premises therein mentioned (without stating them particularly), subject, among other things, to such a proviso; then setting out the substance of the covenant (for the payment of the money), and the breach (for the non-payment) (c). If the deed on which plaintiff declares contain a proviso, operating by way of defeasance of the covenants, the plaintiff is not obliged to state such proviso in his declaration; if the defendant means to rely on it, it is incumbent on him to show it (d). It is sufficient to say "*whereas* by a certain indenture, &c.," without a direct affirmation, that by such an indenture defendant covenanted (e).

Conditions precedent (f).—If A. covenants to do, or to abstain from doing, a certain act, in consideration of the prior performance of some act or covenant on the part of B., A.'s covenant is termed a dependent covenant, because B.'s right of suing A. for a breach of this covenant *depends* upon the prior performance, or that which the law considers equivalent to performance, of the act or covenant to be performed by B., and the prior act or covenant, on

(z) *Hall v. Cazenove*, 4 East, 477.

(a) 1 Wms. Saund. 233, n. (2).

(b) In *Dundass v. Lord Weymouth*, Cowp. 655, the court said they would animadvert upon any future instance of putting parties to the enormous expense of setting out deeds at length, or superfluous parts of them. And in *Price v. Fletcher*, Cowp. 727, where the plaintiff in an action for breach of covenant for quiet enjoyment under a lease, had set

out the whole lease *verbatim*, it was referred to the master to strike out the superfluous matter in the declaration *with costs*.

(c) *Dundass v. Lord Westmeath*, Cowp. 655.

(d) *Elliott v. Blake*, 1 Lev. 88.

(e) *Bullivant v. Holman*, Cro. Jac. 537.

(f) See the decisions in "*Assumpsit*," under same heading, which involve the same principle.

the part of B., being in the nature of a condition precedent, is technically termed a condition precedent, the performance whereof must be alleged and shown (g) by B. in order to entitle him to recover damages against A. It may be remarked, that if the act, undertaken to be done, is dispensed with by the other party, it is sufficient so to state it on the record (h).

The following cases will illustrate the nature of a dependent covenant and condition precedent, and the rules by which the courts have guided their decisions on this subject:—

The plaintiff declared that the defendant by deed poll agreed with the plaintiff, that he would accept of the plaintiff a quantity of South Sea Stock, so soon as the receipts should be delivered out by the Company, and would pay for the same such a sum on a certain day, next after the date of the deed, and then averred that defendant did not pay the money at the day; on demurrer, because the plaintiff had not averred an assignment of the stock, or a tender, *Pratt*, C. J., delivering the opinion of the court, said, that the intent of the parties appeared to be, that one should have the money and the other the stock; and not that either should perform his part of the agreement, and lay himself at the mercy of the other for the equivalent; that this was not a covenant entered into by both parties, upon which each would have his mutual remedy, but it was the deed poll of the defendant only; and, therefore, though upon delivery or tender of the stock, the plaintiff would have his remedy for the money, yet the defendant, on the other side, upon payment of the money, would not have any remedy to compel the delivery of the stock, and therefore he should not be obliged to pay the money, until the consideration for which it was payable was performed: that the word *pro* would either be a condition precedent or subsequent, as would best answer the intent of the parties; and in this case it must be a condition precedent, because otherwise the intention of the defendant to have the stock for his money, could never take effect. He observed also, that the difference between a mutual covenant and a deed poll was taken and allowed in *Pordage v. Cole* (1 Wms. Saund. 320), where the court were of opinion that the defendant had his remedy: “otherwise (says the book) it would have been, *if the deed had been the words of the defendant only*” (i).

In covenant against a lessee for not repairing, the declaration stated that the defendant by indenture covenanted to repair the

(g) By the C. L. P. Act, 1852, s. 57, the plaintiff or defendant may aver the performance of conditions precedent, generally, and the opposite party shall not deny such averment, generally, but shall specify in his pleading, the condition or conditions precedent, the per-

formance of which he intends to contest.

(h) *Per Buller, J.*, in *Hotham v. East India Company*, Doug. 278. See an averment to this effect in *Jones v. Barkley*, Doug. 684.

(i) *Lock v. Wright*, Str. 569. See *Matlock v. Kinglake*, 10 A. & E. 50.

demised premises, and at the end of the term to surrender up the same in good repair, the lessor (the plaintiff) finding timber sufficient for such repairs: the breach assigned was for not repairing; plea, that the plaintiff did not find timber sufficient; on demurrer, it was adjudged, that the finding the timber was a thing in its nature necessary to be done first, and therefore a condition precedent, the performance of which ought to have been averred in the declaration (*k*). So where in a covenant on an indenture of lease for seven years for non-payment of rent, it appeared that the lease contained a proviso, that if the lessee, at the end of the first three or five years, should be desirous of quitting, and should give six months' notice thereof, before the expiration of the first three or five years, then, from and after the expiration of the first three or five years, and payment of all rents, and performance of the covenants on the part of the lessee, the indenture should be void; it was held, that the payment of rent, and performance of the other covenants, by the lessee, were conditions precedent to the lessee's determining the term at the end of the first three years, and that merely giving six months' notice, expiring with the first three years, was not sufficient for that purpose; Lord *Kenyon*, C. J., observing, that it had frequently been said, and common sense seemed to justify it, that conditions were to be construed to be either precedent or subsequent, according to the fair intention of the parties, to be collected from the instrument; and that technical words, if there were any to encounter such intention (and there were not in this case), should give way to that intention; that it was impossible to read this lease, without seeing, that the parties intended, that the tenant should do every thing required of him, before he could put an end to the lease (*l*). So where by a policy of assurance against fire it was stipulated, that the assured sustaining any loss by fire should procure from the minister, churchwardens, and some reputable householders of the parish, a certificate of his character, and of their belief that the loss happened without fraud; it was held, that the procuring such a certificate was a condition precedent to the right of the assured to recover, and that it was immaterial, that the minister and churchwardens wrongfully refused to sign the certificate (*m*); Lord *Kenyon* observing that the court was called upon to give effect to a contract made between two parties, and that, if from the terms of it they could discover the *intention* of the parties to be, that the procuring the certificate by the assured should precede his right to recover, they were bound to give judgment accordingly (*n*).

(*k*) *Thomas v. Cadwallader*, Willes, 496.

(*l*) *Porter v. Shepherd*, 6 T. R. 665.
Acc. Friar v. Grey, 4 H. L. C. 565.

(*m*) Where the obtaining a certificate is a condition precedent, the want of it is

a good defence, even although it be withheld by collusion with the defendant. The plaintiff's remedy in such a case being by action for the tort. *Milner v. Field*, 5 Exch. 829.

(*n*) *Worsley v. Wood*, 6 T. R. 710.

A policy of insurance contained a stipulation that "the sum to be paid by this association to any suffering member for any loss or damage shall in the first instance be ascertained by the committee. A stipulation then followed, that any difference arising between the parties should be referred to arbitration. The House of Lords held, that the ascertainment of the loss by the committee, or by arbitration, was a condition precedent to a cause of action (o). So where the stipulation was that the loss after the same shall be adjusted shall immediately be paid (p).

So where in covenant on a charter-party to recover the value of a ship against defendant, to whom she had been let to freight for the purpose of carrying government stores to America, the declaration stated a covenant, that, if the ship were taken during the time she was in his Majesty's service, and it should appear to a court-martial that the master and ship's company had made the utmost defence they were able, the value of the ship should be paid by the defendant; and then averred a capture, the master and ship's company having made the utmost defence they were able, and that it would have appeared to a court-martial, &c., if the defendant had thought proper to have had an inquiry made in that respect by a court-martial. The defendant pleaded, that it had not appeared, &c. On demurrer to the plea, the court gave judgment for the defendant; observing, that the charter-party annexed an express condition, that it should appear to a court-martial, &c., and therefore the plaintiff was bound to show that it had appeared, or that it arose from the default of the defendant that it had not (q). So where in covenant on a charter-party of affreightment, whereby the defendant agreed to pay to the plaintiff at a certain rate for deals "*delivered at Liverpool*, &c.; the freight to be paid, one-fourth in cash *on her arrival*, and the remainder by an acceptance on London at four months' date," the declaration averred, that before the ship's arrival at Liverpool, the ship was wrecked, whereby the deals were obliged to be put on shore for the preservation thereof; which deals the defendant afterwards accepted, whereby he became liable to pay to the plaintiff a proportionable part of the freight for the carriage of the said deals: a plea, that no part of the said deals was delivered at Liverpool, was held good (r); *Lawrence, J.*, observing, that "when a ship is driven on shore, it is the duty of the master either to repair his ship, or to procure another, and having performed the voyage, he is then entitled to his freight; but he is not entitled to the whole freight, unless he perform the whole voyage, except in cases where the owner of the goods prevents him; nor is he entitled *pro rata*, unless under a

(o) *Avery v. Scott*, 5 H. of L. C. 811.

(p) *Elliott v. Royal Exchange Assurance Company*, L. R. 2 Ex. 237. See cases there cited.

(q) *Davis v. Mure*, cited 1 T. R. 642.

(r) *Cook v. Jennings*, 7 T. R. 381. *Acc. Liddard v. Lopez*, 10 East, 525.

new agreement. Perhaps the subsequent receipt of these goods by the defendant might have been evidence of a new contract between the parties; but here the plaintiff has resorted to the original agreement, under which the defendant only engaged to pay in the event of the ship's arrival at Liverpool. That event has not happened, and therefore the plaintiff cannot recover in this form of action" (s).

By charter-party the freighter covenanted to pay to the owner freight at so much per ton per month, for six months at least, and so in proportion for less than a month, or for such further time as the ship might be in the service of the freighter, until her final discharge, loss, capture, or being last seen or heard of: so much of the freight as might be earned at the time of the arrival of the ship at her first destined port abroad, to be paid within ten days next after her arrival there, and the remainder of the freight at specific periods; it was held, that this constituted one entire covenant, and that the arrival of the ship at her first destined port abroad was a condition precedent to the owner's right to recover any freight; and that the ship having been lost on her outward voyage, the owner was not entitled to recover freight at so much per calendar month to the day of the loss (t).

So the cases are uniform to show that if a person undertakes for the act of a stranger, that act must be done (u). If A. be bound to B. to pay ten pounds to C., A. tenders to C. and he refuseth, the bond is forfeited (x). If a man be bound in an obligation, with condition to enfeoff B. (who is a mere stranger) before a day, the obligor doth offer to enfeoff B. and he refuseth, the obligation is a forfeit, *for the obligor hath taken upon him to enfeoff him*, and his refusal cannot satisfy the condition, because no feoffment is made (y).

"Where a person, by doing a previous act, would acquire a right to a debt, or duty, by a tender to do the previous act, if the other party refuse to permit him to do it, he acquires the right as completely as if it had actually been done." *Per Lord Ellenborough, C. J.* (z). So if the plaintiff has been discharged by the defendant

(s) "It is a settled rule, even in the case of deeds, that if there be a condition precedent in a deed, and it is not performed, and the parties proceed with the performance of other parts of the contract, although the deed cannot take effect, the law will raise an implied assumpsit. Upon this ground freight is daily recovered in actions of assumpsit on implied promises, substituted for the charter-parties by deed." *Per Cur.* in *Burn v. Miller*, 4 Taunt. 748. But this cannot be done where the requirements of the deed have been complied with, the

remedy in such a case being on the deed. *Shack v. Anthony*, 1 M. & S. 573. See further on the apportionment of freight, *Abbott on Shipping*, (6th edit.) 392, *et seq.*; *Ward v. Felton*, 1 East, 507; *Christy v. Row*, 1 Taunt. 300; *Ritchie v. Atkinson*, 10 East, 295.

(t) *Gibbon v. Mendez*, 2 B. & Ald. 17.
(u) *Per Lawrence, J.*, *Worsley v. Wood*, 6 T. R. 710.

(x) 1 Inst. 208, b.

(y) 1 Inst. 209, a.

(z) *Smith v. Wilson*, 8 East, 443.

from the performance of the condition (a). So where the plaintiff has been prevented from the performance by the neglect and default of the defendant (b).

From the preceding cases it may be collected, that wherever there is a condition precedent on the part of the plaintiff, performance, or that which is equivalent to performance, must be alleged and proved, otherwise the action cannot be supported; and, consequently, the defendant may plead non-performance of the condition precedent, in bar of the action; or, if the averment of performance be entirely omitted, the defendant may take advantage of it on demurrer.

Concurrent Acts (c).—Where reciprocal acts or covenants are to be performed by each party at the same time, they are technically termed concurrent acts or covenants; and in this case, as well as in the case of dependent covenants, one party cannot maintain an action against the other, without averring performance, or that which is equivalent to performance, or at all events a readiness and willingness to perform the acts or covenants to be performed on the plaintiff's part. As where A. covenanted that he would, on or before a certain day, convey land to B., by such conveyance as B.'s counsel should advise; in consideration of which B. covenanted to pay A., *at or upon the execution of the conveyance*, a certain sum of money; it was held, that A. could not maintain covenant against B. for non-payment of the money without showing that he had conveyed; or that he was ready at the day to have conveyed, what he had covenanted to do, and that he had done every thing which lay upon him to do for that purpose, but that he was prevented from so doing by some act, or omission, or neglect, on the part of the defendant (d). But where it was agreed by specialty between A. and B. that B. should pay A. a sum of money for his lands *on a particular day*, it was held to be an independent covenant, and that A. might bring an action of covenant or debt for the money before any conveyance by him of the land (e). So where the defendant by a distinct instrument, *e. g.*, a promissory note, agrees to pay the money on a particular day (f).

In covenant for not accepting stock of the Hudson's Bay Company, *at the Company's house*, on a certain notice, the plaintiff averred that he gave notice to the defendant to come there and accept the stock, and that the plaintiff was *ready there at the day*,

(a) *Laird v. Pin*, 7 M. & W. 474.

(b) *Hotham v. East India Company*, 1 T. R. 645. The rule as to the necessity of stating, in the first instance, the matter of excuse for the non-performance of a condition precedent has not been altered by the C. L. P. Acts. The conditions and the excuses must not be averred in a general form. *London Dock*

Company v. Sinnott, 8 E. & B. 347.

(c) See *ante*, "Assumpsit," under same heading.

(d) *Heard v. Wadham*, 1 East, 619.

(e) *Pordage v. Cole*, 1 Wms. Saund. 319. *Acc. Mattock v. Kinglake*, 10 A. & E. 50.

(f) *Spiller v. Westlake*, 2 B. & Ad. 155.

and offered to transfer it, but that the defendant did not come to accept it, nor had paid the price agreed, &c. ; upon demurrer, the declaration was held ill, for where the party to whom the act is to be done does not come to the time and place appointed, the other ought to show that he came at the last time which the law has appointed for doing the act, and if he came there before he ought to show that he continued there to the last time ; and that, as the stock could only be transferred when the Company's house was open, which was at stated hours of the day, the plaintiff should have averred the usage of the Company in that respect, and that he came there at the proper time and stayed there till the house was shut (*g*).

Mutual and Independent Covenants.—Where covenants are mutual and independent, one party may maintain an action against the other for a breach of covenant, without averring a performance, or any thing equivalent to a performance, of the covenants on his part ; and the defendant cannot plead non-performance of such covenants on the part of the plaintiff in bar of the action (*h*).

The plaintiff, who was master of a vessel, covenanted to make use of the same in the coal trade, for the defendant's service ; and also covenanted amongst other things that he would pay all the seamen's wages yearly ; in consideration whereof, the defendant covenanted to pay the plaintiff 42*l.* every month ; the non-payment whereof was the breach assigned. The defendant pleaded, that the plaintiff did not pay the seamen according to his covenant. On demurrer, it was insisted by the plaintiff, that these were mutual covenants, and that though the words were "in consideration thereof," yet, in the nature of the thing, this could not be a condition precedent, for the payment of the seamen, by the plaintiff, was to be yearly, of the plaintiff, by the defendant, monthly ; so that from the manner of covenanting it was impossible the performance of the act to be done by the plaintiff should be necessary to entitle him to an action against the defendant for not doing the act he had covenanted to do. Judgment for the plaintiff (*i*).

The plaintiff, in consideration of 250*l.* paid by the defendant, and a further sum of 250*l.* to be paid in the manner thereafter mentioned, covenanted that he would, *with all possible expedition*, teach the defendant a certain method of bleaching materials for making paper, and would also permit him to use a patent which the plaintiff had taken out for that purpose ; in consideration whereof the defendant covenanted that he would, *on or before the 25th of February, 1794*, or sooner, in case the plaintiff should

(*g*) *Lancashire v. Killingworth*, Lord Raym. 686. Although performance of conditions may now be averred in general terms, yet the above case is still useful

as showing what *evidence* is necessary in such a case.

(*h*) *Darson v. Myer*, Str. 712.

(*i*) *Russen v. Coleby*, 7 Mod. 236.

before that time have sufficiently taught defendant the bleaching process, pay the plaintiff the further sum of 250*l*. Demurrer, that it was not averred that the plaintiff had instructed defendant in the manner of bleaching the materials. Lord *Kenyon*, C. J., delivering the opinion of the court, said, "Whether these kinds of covenants be or be not independent of each other, must certainly depend on the good sense of the case.—'Where there are mutual promises, yet if one thing be the consideration of the other, there a performance is necessary, *unless a day is appointed for performance*.' Per *Holt*, C. J., Salk. 113. 'If a day be appointed for the payment of the money, and the day is to happen before the thing can be performed, an action may be brought for the payment of the money, before the thing be done,' *ib*. 171. Upon the authority of these cases, the judgment of the court must be in favour of the plaintiff, if, upon the true construction of the deed, a certain day be fixed for the payment of the money, and the thing to be done *may* not happen until after. The plaintiff in this case covenants *with all possible expedition, not by any fixed time*, to instruct the defendant in bleaching linen, &c.; and in consideration of the plaintiff's covenants, the defendant covenants, that he will, on or before the 25th day of February, or sooner, in case the plaintiff should before that time have instructed the defendant, pay him the further sum of 250*l*.—The intent of the parties appears to be that the payment might be accelerated, but should not in any event be delayed." Judgment for plaintiff (*k*). In a subsequent case (*l*), *Kenyon*, C. J., speaking of *Campbell v. Jones*, said, "The instruction to be given was not to be, and could not, in the nature of the thing, be performed at the same time with the payment of the money by the defendant, for which a certain time was limited, whereas no time was limited for giving the instruction;" and *Lawrence*, J., observing on this case, said that "the instruction might, consistently with the plaintiff's covenant, as well be given after as before the time specified for the payment of the money." So where, in a farming lease, the defendant (the lessor) covenanted to erect within eighteen months certain farm-buildings, "the whole of which were to be left to the superintendence of the lessee (the plaintiff) and the lessor's son," it was held that the covenant to erect the buildings was an absolute one, and that the stipulation to leave the work to the superintendence of the parties named was not a condition precedent to the doing of the work (*m*).

Unless the non-performance alleged in breach of the contract goes to the whole root and consideration of it, the covenant broken is not to be considered as a condition precedent, but as a distinct covenant, for a breach of which the party injured may be compensated in damages. The first of this class is the case of *Boone*

(*k*) *Campbell v. Jones*, 6 T. R. 570.

(*l*) *Glazebrook v. Woodrow*, 8 T. R. 370.

(*m*) *Jones v. Cannock*, 5 Exch. 713.

v. *Eyre* (n), which was as follows:—The plaintiff sold to the defendant an estate in Dominica, with the negroes, under the usual covenants for title, in consideration of a sum in gross and of an annuity which the defendant covenanted to pay, “he the plaintiff well and truly performing all and singular the covenants, &c. in the said indenture contained.” In bar to an action of covenant for the arrears of the annuity, the defendant pleaded that the plaintiff had not full power, title, &c. to sell the said plantation and negroes. The court said, it would be strange if such a defence were to be allowed, when, if any one negro on the plantation were proved not to have been the property of the plaintiff, it would bar his action for the annuity; and *per* Lord Mansfield, C. J., “where mutual covenants go to the whole of the consideration on both sides, they are mutual conditions, the one precedent to the other; but where they go only to a part, where a breach may be paid for in damages, there the defendant has a remedy on his covenant, and shall not plead it as a condition precedent” (o). “The judgment of the court (in *Boone v. Eyre*) went on the ground that, in the form the breaches were assigned, *the plea did not necessarily go to the whole of the consideration*; but if the plea had been, that the plaintiff had not any title to the plantation, he did not know that it would not have been held sufficient” (p). “The substantial part of the agreement being the conveyance of the property in respect of which the annuity was to be paid, the court held it to be no answer to an action for the annuity to say, that the plaintiff had not a good title in some of the negroes, which were upon the plantation: *because all the material part of the covenant had been performed*; and the plaintiff had a remedy upon the covenant for any special damage sustained for the non-performance of the rest (q). The above rule has been frequently recognised (r).

In *Ritchie v. Atkinson*, 10 East, 295, the master and the freighter of a vessel agreed, that the ship should proceed to St. Petersburg, and there load a *complete* cargo of hemp and iron, and proceed therewith to London, and deliver the same on being paid freight, at a certain rate per ton. It was held, that the delivery of a complete cargo was not a condition precedent, but that the master might recover freight for a short cargo delivered in London at the stipulated rates per ton, the freighter having his remedy in damages for such short delivery. Where freight was covenanted to be paid in consideration of several things, one of which was the sailing

(n) Reported, but imperfectly, in 2 Bl. R. 1312, and 1 H. Bl. 273, n. This case will be found among the paper books of *Ashurst*, J., A. P. B. No. 41, Dampier, MSS. L. I. L.

(o) 1 H. Bl. 273, n. It must be borne in mind that the above rule is only *one of the means* of discovering the intention of the contracting parties. *Per Tindal*, C. J.,

Stavers v. Curling, 3 B. N. C. 368.

(p) *Per Lawrence*, J., *Glazebrook v. Woodrow*, 8 T. R. 374.

(q) *Per Le Blanc*, J., *S. C.*

(r) See *per Littledale*, J., in *Franklin v. Miller*, 4 A. & E. 605; *per Tindal*, C. J., in *The Fishmongers' Company v. Robertson*, 5 M. & G. 197; *Carpenter v. Cresswell*, 4 Bingh. 409.

with the first convoy ; it was held, that as the object of the contract was the performance of the voyage, which in this case had been performed, the sailing with the first convoy was not to be considered as a condition precedent, but as a distinct covenant, for the breach of which the party injured might be compensated in damages (s). It was held, in the same case, that the covenant for the right delivery of the cargo was satisfied by the delivery of the entire number of chests, and that the deteriorated state of their contents afforded no answer to the action for the recovery of the freight, the defendant having a cross action to recover damages for that. So where the plaintiff covenanted with defendants, that he would proceed to the Southern whale fishery, and procure a cargo of sperm oil, or as great a proportion as might be, under all circumstances, in his power to obtain, would return to London, and at his own cost deliver the cargo, would obey instructions, be frugal of provisions, and not dispose of any of them without accounting for the same, and would not smuggle or trade, or permit any on board to do so : the defendants covenanted, *on the performance of the before-mentioned terms and conditions* on the part of the plaintiff, to pay him a certain proportion of the net proceeds of the cargo ; it was held, that the plaintiff's covenants were independent, and that the performance of them was not a condition precedent to the plaintiff's right to recover his stipulated remuneration (t).

But where in a memorandum of charter it was agreed that a vessel should proceed to Trieste and there load a full cargo, and being so loaded should proceed to a port in the United Kingdom, and deliver the same, upon payment of freight at a certain rate, &c. ; "*the vessel to sail from England on or before the 4th of February then next* ;" it was held ; that the sailing on or before the 4th of February, was a condition precedent (u) ; and this, although the ship be prevented from sailing by the act of God, and there be a stipulation in the charter-party to this effect, " Restrictions of princes, dangers of the seas, the act of God, &c. *throughout this charter-party*, always excepted" (x). *Secus*, if the stipulation be, that the ship shall sail with all convenient speed, no particular day being fixed ; unless by the breach of such stipulation the object of the voyage be wholly frustrated (y) ; which must be pleaded (z). So where the charter was of a ship from London to Madeira and the Cape of Good Hope, and thence to Bombay and back ; the plaintiff claimed damages from the defendant for not loading the ship with a cargo of cotton at Bombay. Instead of proceeding by the direct and usual course from the Cape to Bombay, the

(s) *Davidson v. Gwynne*, 12 East, 389.

(t) *Stavers v. Curling*, 3 B. N. C. 355.

(u) *Glaholm v. Hays*, 2 M. & G. 257.

Acc. Oliver v. Fielden, 4 Exch. 135.

(x) *Croockewit v. Fletcher*, 1 H. & N.

893.

(y) *Tarrabochia v. Hickie*, 1 H. & N. 183.

(z) *Clipsham v. Vertue*, 5 Q. B. 265.

captain made a deviation to the island of Mauritius; and in consequence of such deviation, the defendant's agents at Bombay refused to find a cargo. The jury were directed to consider, whether the deviation was of such a nature and description as to deprive the freighter of the benefit of the contract into which he had entered; and if such was their opinion, the defendant was excused, by the act of the plaintiff's captain, from furnishing a cargo. The jury determined the question in the affirmative, and the court held the direction to be right (a).

Defendant by charter-party covenanted to load a ship at Jamaica with a complete cargo of sugar, and to pay freight for the same at the rate of 10s. 6d. per cwt. The agent of the defendant tendered to the captain a cargo, but insisted upon his signing bills of lading for it, at the rate of 10s. per cwt. The captain refused to take it on board on those terms. Lord *Ellenborough* held, that the covenant to load a complete cargo had been broken, and that the defendant was liable for dead freight (b).

By a charter-party a ship was described to be of the burden of two hundred and sixty-one tons, and the freighter covenanted to load a full and complete cargo; it was held, that the loading of goods equal in number of tons to the tonnage described in the charter-party was not a performance of this covenant; but that the freighter was bound to put on board as much goods as the ship was capable of carrying with safety (c). Where the ship was described in the charter-party as "of the measurement of one hundred and eighty or two hundred tons or thereabouts," to an action for not loading, the defendant pleaded that the ship was of a measurement greatly and unreasonably exceeding two hundred tons or thereabouts, wherefore the defendant did not load; it was held, that the statement was matter of description only, and did not amount to a warranty (d). In such a case it would, it seems, be a good plea that the excess of size was unreasonable, and that the size of the ship was a material part of the contract; which would be a question for the jury (e).

By a charter-party the freighter agreed to pay for the ship 200l. per month, for six months certain, and so in proportion for any longer time that she might be *in his employ*; the ship was to be kept in repair by the owner. Before the termination of the time repairs were necessary, which occupied twenty-eight days; it was held, that the freighter was not entitled to deduct those days in calculating the period for which he was to pay freight (f).

Although by the law of England freight, strictly so called, does not become due till the termination of the voyage, yet, if the parties expressly stipulate that all or part of the freight shall be

(a) *Freeman v. Taylor*, 8 Bingh. 124.

(b) *Hyde v. Willis*, 3 Campb. 202.

(c) *Hunter v. Fry*, 2 B. & Ald. 421.

(d) *Barker v. Willde*, 5 E. & B. 675.

(e) *Per Martin, B., S. C.* See *Ollive v. Booker*, 1 Exch. 416.

(f) *Ripley v. Scaife*, 5 B. & C. 167.

paid by anticipation, and it is so paid, it cannot be recovered back on the non-completion of the voyage (g).

It remains only to add a similar observation to that which was made *ante*, tit. "Assumpsit," viz. that there are not any precise technical words required to constitute a condition precedent, or a dependent or independent covenant; whether a condition be precedent or subsequent, or a covenant be dependent or independent, must be gathered from the words and nature of the agreement, which is to be construed according to the intention of the parties, as far as that can be collected from the instrument (h); to which intention, when once discovered, all technical forms of expression must give way (i); and, however transposed the covenants may be (k), their precedence must depend on the order of time in which the intent of the transaction requires the performance. When it is once established, that the stipulation of one party is a condition precedent to the performance of the covenant by the other party, it follows as a necessary consequence, that an action cannot be maintained, unless performance, or that which the law considers as equivalent to performance, be averred (which may now be done quite generally) and proved. But where a right of action is once vested in the plaintiff, liable, however, to be divested by the non-performance of a condition subsequent, that is matter of defence only, and must be shown by the defendant (l).

Of the Breach.—The breach assigned ought to be co-extensive with the import and effect of the covenant; but, where the covenant is general, the breach may be assigned as generally as the covenant: and it is sufficient, if it negative the words of the covenant; as where, in covenant on an indenture of lease, that defendant had full power and lawful authority to demise, the breach assigned being, that defendant, at the time of making the said indenture, had not full power and lawful authority to demise the premises according to the form and effect of the indenture, it was resolved, that the assignment of the breach was good; because it had pursued the words of the covenant negatively, and that it lay more properly in the knowledge of the lessor what estate he himself had in the land, than in the lessee, who was a stranger to it; and, therefore, that the defendant ought to have shown what estate he had in the land at the time of the demise, whereby it might have appeared to the court, that he had full power and authority to demise (m). So where the declaration stated that the

(g) *De Silvale v. Kendall*, 4 M. & S. 37; *Saunders v. Drew*, 3 B. & Ad. 450. See further on the subject of conditions, *Blackwell v. Nash*, Str. 535; *Wyvill v. Stapleton*, Str. 615; *Terry v. Duntze*, 2 H. Bl. 389.

(h) See *Harrison v. Great Northern Railway*, 12 C. B. 576.

(i) Per *Tindal*, C. J., in *Fishmongers' Co. v. Robertson*, 5 M. & G. 197.

(k) Per Lord *Mansfield*, C. J., in *Kingston v. Preston*, cited Doug. 691.

(l) *Hotham v. East India Company*, 1 T. R. 638.

(m) *Salmon v. Bradshaw*, 9 Rep. 60, b.

plaintiff by indenture let a house to the defendant's testator, who covenanted to repair it well during the term, and at the end of the term to leave it well repaired; and the breach assigned was, that the lessee did not leave it well repaired at the end of the term; an exception was taken, because the declaration did not show in what point the house was not well repaired: but it was overruled; for, the breach being according to the covenant, it was sufficient; but if the defendant had pleaded, that at the end of the term he delivered it up well repaired, then if the plaintiff will assign any breach, he ought particularly to show in what point it was not well repaired, so as the defendant might give a particular answer thereto (*n*). In an action by a master against his servant, on a covenant not to buy or sell without the master's leave, within two years, the breach assigned was, that defendant had *diversis diebus et vicibus*, between such a day and such a day, sold to H., and to several other persons unknown, goods to the value of 100*l*. It was moved in arrest of judgment, that the breach was uncertain as to the times and persons; but *Holt*, C. J., said, that in *covenant* (*o*) it was sufficient if a general breach was assigned; and that the breach in question was certain enough; for it was so described, that if another action were brought, the defendant might plead a former recovery for the same cause, and aver this to be the same selling; and *Gould*, J., agreed, that, the action being only for damages, it was well enough (*p*).

Plaintiff declared that defendant covenanted to allow him 2*s*. for every quire of paper he should copy, and assigned for breach, that he copied four quires and three sheets, for which 8*s*. 3*d*. was due, which defendant had not paid. On writ of error, after verdict and judgment for plaintiff, it was moved that there could not be any apportionment in this case, for the covenant was to allow plaintiff 2*s*. for copying a quire, but not *pro rata*, for which cause the judgment was reversed (*q*). But it seems that on demurrer this objection would not avail the defendant, because in that case the plaintiff might remit his claim for the odd sheets, and enter up judgment for the residue, in conformity to the rule laid down in *Incedon v. Crips*, Salk. 658, recognized in *Buckley v. Kenyon*, that where the sum demanded does not depend on the deed itself, but upon matter extrinsic, there may be a remittitur; because the variance is not inconsistent with the deed. In covenant the breach assigned was for non-payment of the rent on different days, *which amounted to a certain sum*, and the plaintiff had made a mistake in calculating the sum; it was held good; because in this action

Acc. Muscot v. Ballett, Cro. Jac. 369; *Brigstock v. Stannion*, Ld. Raym. 106; *Proctor v. Burdet*, 3 Lev. 170; *Boscawen v. Cook*, 1 Raym. 107; *Rawlins v. Vincent*, Carth. 124.

(*n*) *Hancock v. Field*, Cro. Jac. 170.

(*o*) *Secus* in debt on bond to perform covenants, or for a penalty on a statute; there a precise breach must be shown. *Brigstock v. Stannion*, Ld. Raym. 107.

(*p*) *Farrow v. Chevalier*, Salk. 139.

(*q*) *Needler v. Guest*, Aleyn, 9.

the whole shall be recovered in damages, and the plaintiff shall not have damages according to his summing, but according to the matter (*r*). The plaintiff declared on an indenture of demise for years of certain coal-mines, reserving a fourth part of the coal raised, or its value in money, at the election of the lessor; but if the fourth part fell short of the annual value of 400*l*., then reserving such additional rent as would make up that annual sum, to be rendered on the first of every month in each year of the term, by equal portions; and that the plaintiff elected to be paid in money; the breach assigned was that 900*l*. of the rent reserved for two years and *three months* was in arrear. On demurrer, it was objected that, the rent being reserved yearly, the breach was not well assigned, inasmuch as it included a fraction of the year; but the court overruled the demurrer, observing, that it could not be sustained on the construction of the covenant; for, though it spoke of an annual sum of 400*l*. to be made up in case the proportion of coal reserved should fall short of that sum, yet the rent was to be rendered monthly. But, even admitting it to be a yearly rent, the excess for three months might be remitted, and judgment given for the residue (*s*).

Where lessee covenanted for himself and his assigns to plant a certain number of trees every year, and the breach was, that defendant had neglected to do it; it was held sufficient without negating that his assigns had done it, for the court will not intend an assignment (*t*).

VIII. *Of the Pleas.*

1. *Accord and Satisfaction.*

Accord with satisfaction is a good plea in discharge of damages for covenant *broken* (*u*), the damages being unliquidated (*v*), but it is not a good plea *before* breach (*x*); for accord with satisfaction before breach, unless it be by deed, and amount in effect to a release (*y*), is nothing more than a dispensation, which cannot be of a deed by parol (*z*), unless by the effect of sect. 83 of the Com-

(*r*) *Farrer v. Snelling*, 1 Roll. Rep. 335.

(*s*) *Buckley v. Kenyon*, 10 East, 139.

(*t*) *Gyse v. Ellis*, Str. 228.

(*u*) *Smith v. Trowsdale*, 3 E. & B. 83.

(*v*) *Harris v. Goodwyn*, 2 Scott. N. R. 466.

(*x*) *Spence v. Healey*, 8 Exch. 668.

(*y*) *Mayor of Berwick v. Oswald*, 1 E. & B. 295.

(*z*) *May v. Taylor*, 6 M. & G. 262, n.

mon Law Procedure Act, 1854, which allows equitable defences to be set up (a).

In covenant against an assignee for not repairing a house, the defendant pleaded accord between him and the plaintiff, and execution thereof, in satisfaction and discharge of the want of repairs; on demurrer, it was objected, that this action of covenant was founded upon the deed, which could not be discharged except by matter of as high a nature, and not by any accord of matter *in pais*; but it was resolved by the court, that the plea of the defendant was good; and this distinction was taken:—Where a duty accrues by the deed, and is ascertained at the time of making the writing, as by covenant, bill, or bond, to pay a sum of money, in that case, the duty, which is certain, takes its essence and operation originally and solely by the writing, and therefore it must be avoided by matter of as high a nature, although the duty be merely in the personalty. But where no certain duty accrues by the deed, but a *wrong or subsequent default*, together with the deed, gives an action to recover damages, which are only in the personalty, for such wrong or default, accord with satisfaction is a good plea; as, in this case, where the covenant does not give the plaintiff, at the time of making it, any cause of action, but the tort or default in not repairing the house, together with the deed, gives an action to recover damages for the want of reparation; and the action is not founded merely on the deed, but on the deed and the subsequent wrong; which wrong is the cause of action, and for which damages shall be recovered; and in every action where compensation is demanded by way of damages only, accord executed is a good bar (b). So a collateral agreement by parol cannot be pleaded to invalidate a claim arising upon a deed. Hence to debt on bond, conditioned for the performance of an award, a parol agreement between the parties to waive and abandon the award cannot be pleaded (c). So a plea of leave and licence to an action of covenant is bad (d). “Nothing can discharge a covenant to pay on a certain day but actual payment or tender on that day, although, if the party afterwards chooses to receive the money, that may be pleaded by way of accord and satisfaction,” per *Parke*, B. (e).

The plaintiff being seised in fee of a messuage and lands, one parcel of which lay contiguous to the land of one E. P., conveyed the said parcel of land to E. P. in fee, who thereupon covenanted for herself and her assigns, that she would pay one-third part of all the taxes and assessments imposed on the said messuage and land; the parcel of land came to the defendant by

(a) *Clerk v. Laurie*, 1 H. & N. 458.

(b) *Blake's case*, 6 Rep. 43, b. *Preston v. Christmas*, 2 Wils. 86.

(c) *Braddick v. Thompson*, 8 East, 344.

See *Thompson v. Brown*, 7 Taunt. 656.

(d) *Sellers v. Bickford*, 8 Taunt. 31.

(e) *Poole v. Tunbridge*, 2 M. & W. 223.

See *Massey v. Johnson*, 1 Ex. 253.

assignment, who neglected to pay the one-third part of the taxes for several years. The plaintiff having declared for a breach of covenant, in the years 1759, 1760, 1, 2, 3, 4, 5 and 6, the defendant pleaded, that in Mich. Term, 1766, he commenced an action against the plaintiff, and one R. J., for certain trespasses committed by them upon the lands and goods of the defendant; and thereupon, afterwards, it was agreed (not saying by deed), that the defendant should put an end to his suit, and that the plaintiff and R. J. should pay a certain sum of money, and costs; and that *the plaintiff should relinquish all damages and demands which he then had against the defendant*; the plea then averred that the defendant did not further prosecute his suit against the plaintiff and R. J. On demurrer to this plea, it was objected, that a covenant to pay money which was by deed, could not be discharged without deed: and of this opinion was the court, and gave judgment for plaintiff (g). So where a lessee covenanted to yield up to his lessor at the end of the term all erections set up during the term on the demised premises, which covenant he broke by removing a certain greenhouse, a plea to an action for such breach, stating a parol agreement between the lessor and lessee, that, if the latter would erect the greenhouse, he should be at liberty to remove it at the expiration of the term, was held bad (h). So where in covenant against an administratrix for breaches of covenant contained in an indenture made by her testator, and committed both by him in his lifetime and by her since his death, she pleaded that she took out administration at the request of the plaintiff, and upon his promise not to sue her, as administratrix or otherwise, for any breaches of the covenants contained in the said indenture: the plea was held bad (i).

2. Eviction (k).

To covenant for rent arrear, the lessee may plead that he was evicted, by the lessor, from the demised premises, and kept out of possession until after the rent in question became due; for an *eviction* occasions a suspension of the rent (l). But a mere trespass will not; for where to covenant for rent arrear for a dwelling-house the defendant pleaded that the lessor had taken away a pent-house, fixed to the dwelling-house, and part of the demised premises; on demurrer, the court held, that the facts stated in the defendant's plea being a mere trespass, for which the defendant might have a remedy by action, would not operate as a suspension of the rent (m). Although rent is suspended by an entry into

(g) *Rogers v. Payne*, MS.; 2 Wils. 376, S. C. briefly stated. See further 6 M. & S. 262, note (a), and *Outram v. Rolston*, 2 Keb. 51.

(h) *West v. Blakeway*, 2 M. & G. 729.

(i) *Harris v. Goodwin*, 2 M. & G. 405.

See *Samford v. Cutcliffe*, Yelv. 124.

(k) What is, see *Upton v. Townsend*, 17 C. B. 30.

(l) *Dalston v. Reeve*, Lord Raym. 77.

(m) *Roper v. Lloyd*, T. Jones, 148, cited in *Hunt v. Cope*, Cowp. 242.

part (*n*), and expulsion therefrom (*o*), yet on a demise of a messuage with the appurtenances, the covenant *to repair* is not suspended by an entry into the back yard, the lessee remaining in possession of the messuage (*p*).

It is to be observed, that if a tenant would excuse himself from payment of rent upon an eviction by a stranger, he must show that such stranger had a good title to evict him: and in order to give the plaintiff a proper opportunity of controverting such title, the defendant must show particularly how it arises; for, if it were sufficient to allege that the stranger had a good title, a single issue could not be taken on it; and, as the legality, as well as the fact of the title, would be complicated together, the jury would be entangled with questions of law, which are proper for the consideration of the court only. To avoid this inconvenience, it is necessary that the title should be specified (*q*).

3. *Illegal Purpose.*

All the decisions show, that at common law, a contract entered into to effect an illegal purpose is void, and cannot be enforced; and it makes no difference that the contract is under seal. Hence where to covenant for non-payment of rent, it was pleaded that the 25 Geo. III. c. 77, makes it illegal to boil turpentine in any warehouse nearer to any other building than seventy-five feet, and that the premises demised were within that distance, and let for the express purpose of being so used (*r*); this was held a good plea, although the lease did not mention the purpose for which it was executed, nor was it averred that the unlawful purpose had been carried into effect; for, it having been pleaded that such was the purpose, it might have been proved by evidence *dehors* the lease, had issue been joined on the fact (*s*).

4. *Infancy.*

At the common law, infants are not bound by covenants which operate to their disadvantage. Hence a defendant may insist on his non-age, as a defence to an action of covenant; but this defence must be pleaded specially. 8 Pl. R. Hil. T. 1853. The 5 Eliz. c. 4, s. 42 (*t*), whereby infants are enabled to bind themselves apprentices, has not altered the common law as to the binding force of covenants entered into by infants, at least where the covenants are collateral covenants. This point, which was

(*n*) *Dorrell v. Andrews*, Hob. 190.

(*o*) *Reynolds v. Buckle*, Hob. 326.

(*p*) *Snelling v. Stag*, Bull. N. P. 165.

(*q*) *Per Lord Hardwicke*, C. J., in *Jordan v. Twells*, B. R. M. 9 Geo. II. MSS. and Ca. Temp. Hardw. 172.

(*r*) This is, it seems, essential. *Feret v. Hill*, 15 C. B. 207.

(*s*) *The Gaslight and Coke Company v. Turner*, 6 B. N. C. 324.

(*t*) Amended by 54 Geo. III. c. 96.

formerly doubted (*u*), was fully established by *Gilbert v. Fletcher*, Cro. Car. 179 (*x*). There, in covenant against an apprentice for departing from the plaintiff's service without licence, within the time of his apprenticeship, the defendant pleaded, that at the time of making the indenture he was within age. On demurrer, judgment was given for the defendant; the court being unanimous that, although an infant might voluntarily bind himself an apprentice, and if he continued an apprentice for seven years, might have the benefit to use his trade; yet, neither at the common law, nor by 5 Eliz. c. 4, did a covenant or obligation of an infant, for his apprenticeship, bind him; nor did any remedy lie against an infant, upon such covenant (*y*). By the custom of London, an infant may bind himself by covenant in an indenture of apprenticeship (*z*).

Covenant upon an indenture of apprenticeship by the master against the father; breach, that the apprentice absented himself from the service; plea, that the son faithfully served until he came of age, and that he then avoided the indenture; it was held that this was no answer to the action, for that the covenant by the father was absolute, that the apprentice should serve during the term (*a*). It is a good plea to an action by the father against the master for not teaching, &c., that the apprentice absented himself and never returned (*b*); although, if he does return within a reasonable time, even after having misconducted himself, the master is bound to perform his covenant (*c*).

5. Limitations, Statute of.

By 3 & 4 Will. IV. c. 42, s. 3, all actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, &c., shall be commenced and sued within twenty years after the cause of such action or suit, but not after.—Covenant for rent arrear (*d*), or for non-payment of the arrears of a rent-charge (*e*), may be brought within the time limited by the foregoing section, and is not limited to six years by 3 & 4 Will. IV. c. 27, s. 42 (*f*); but only six years' arrears of a fee-farm rent granted by letters patent can be recovered, no action of debt or covenant lying on such letters (*g*). See *post*, tit. "Debt," VIII.

(*u*) *Fleming v. Pitman*, Winch. 63; Hutt. 63.

(*x*) *Lyllly's case*, 7 Mod. 15, *acc.*

(*y*) *Acc. Whittingham v. Hill*, Cro. Jac. 494.

(*z*) *Horn v. Chandler*, 1 Mod. 271; *Anon.*, 1 Lev. 12.

(*a*) *Cuming v. Hill*, 3 B. & Ald. 59.

(*b*) *Huges v. Humphreys*, 6 B. & C. 680.

(*c*) *Winstone v. Linn*, 1 B. & C. 460.

(*d*) *Paget v. Foley*, 2 B. N. C. 679.

(*e*) *Strachan v. Thomas*, 12 A. & E. 546.

(*f*) See on the construction of these two statutes in equity, *Hunter v. Nockolds*, 1 Mac. & G. 640; 19 L. J., Ch. 177; *Hodges v. Croydon Canal Company*, 3 Beav. 86; *Sinclair v. Jackson*, 17 *ibid.* 405.

(*g*) *Humphrey v. Gery*, 7 C. B. 567.

6. *Nihil habuit in tenementis.*

If a lease be by indenture, the lessee is estopped from pleading *nil habuit*: and if the plaintiff declare on the indenture, and the defendant pleads that the lessor *nil habuit in tenementis*, the plaintiff, instead of replying the estoppel, may demur; because the estoppel appears on the record (*h*). Covenant was brought by the assignee of a reversion for non-payment of rent. The declaration stated that J. P. was seised in fee, demised by indenture to the defendant, and afterwards assigned the reversion to the plaintiff. Plea, that before the demise and assignment of the reversion to the plaintiff, J. P. conveyed the premises to J. S. in fee, and traversed, that at any time after that conveyance J. P. was seised in fee. On demurrer it was held, that this amounted to a plea of *nil habuit in tenementis*, which was not to be allowed, where the demise was by indenture; and, although the plaintiff was an assignee yet he might take advantage of the estoppel, because it ran with the land (*i*). So where in covenant by lessor on an indenture of lease for not repairing, the lessee pleaded, that the lessor had an equitable estate only in the thing demised, on demurrer, the plea was held bad (*k*).

It is an universal rule that a tenant shall not be permitted to set up any objection to the title of his landlord, under whom he holds: this is not a mere technical rule, but one founded in public convenience and policy. Hence a lessee of land in the Bedford Level cannot object to an action by his landlord for a breach of covenant, in not repairing, that the lease was void by the 15 Car. II. c. 17. for want of being registered. The act meant, for the protection of titles, that leases and conveyances, within this district, should be registered, that every person interested in the inquiry might know in whom the title to such land was; and, therefore, as against persons who have been deceived by the omission to register, or even as against those who, without being deceived, knew that the act had not been complied with, and relied on it, the legal objection might prevail at law; but not as between the parties themselves to the lease, between whom the act was not meant to operate (*l*). So where in an action of covenant for rent, brought by the assignees of a lessor (a bankrupt), the defendant pleaded, that the lessor *nil habuit*, &c.; the plea was held bad, on demurrer (*m*). So the assignee of a lessee cannot plead that the lessor did not demise (*n*).

It may be observed that, in the preceding cases, the want of title did not appear on the face of the declaration; and it seems that, in

(*h*) *Palmer v. Ekins*, Str. 818.

(*i*) *Palmer v. Ekins*, *supra*.

(*k*) *Blake v. Foster*, 8 T. R. 487.

(*l*) *Hodson v. Sharpe*, 10 East, 350.

(*m*) *Parker v. Manning*, 7 T. R. 537.

(*n*) *Taylor v. Needham*, 2 Taunt. 278;
Aveline v. Whisson, 4 M. & G. 801; see
Cooch v. Goodman, 2 Q. B. 580.

order to give a party the benefit of an estoppel, in all cases where it is necessary to set forth a title, a good title must appear on the face of the declaration; for in *Nokes v. Awdler*, Cro. Eliz. 373, 436, it was resolved, by all the judges, that, although they would not intend a lease to be good by estoppel only, yet, where it appeared on the face of the declaration to be so, the assignee of such a lease could not maintain an action for the breach of any of the covenants contained in the lease (o). So where covenant was brought against a lessee for years, on an indenture of lease, and it appeared on the declaration, that the lease was executed by a tenant for life, that the plaintiff, the reversioner, who was then under age, was named in the lease, but that the lease had not been executed by him until after the death of the tenant for life, judgment was given for the defendant, on the ground that the lease was void by the death of tenant for life: *Buller, J.*, observing, that the court could not proceed on the doctrine of estoppel in this case, because it was admitted by the plaintiff, on the pleadings, that he did not execute until after the death of the tenant for life (p). So where the plaintiff declared, that by deed made between her as attorney for J. S., and the defendant, she demised a house to the defendant, and that he covenanted to pay the rent to J. S., and then assigned a breach in the non-payment of the rent, to the damage of the plaintiff (the attorney). It was objected, on demurrer, that the lease was void, because, the plaintiff acting only as attorney to J. S., it should have been made a lease from him, and in his name (q), and that the lease being void, the covenant to pay the rent was void also. *E contra* it was insisted that, the instrument being under seal, the defendant was estopped from saying the plaintiff did not demise. But the court held, that, it appearing on the declaration that the lease was void, because it was not made in the name of J. S., whose house it appeared to be, and that the plaintiff only made it as his attorney, there could not be any estoppel, and then the covenant to pay the rent was void, and consequently the plaintiff could not maintain the action (r).

Where a lease, by indenture, takes effect in point of interest, which interest may be co-extensive with the lease in point of duration, but in fact determines before it, the lease may then be avoided, and the parties are not estopped from showing the facts which determined the lease; as where A., lessee for the life of B., makes a lease for years, and afterwards purchases the reversion in fee; B. dies; A. shall avoid his own lease; for he may confess and avoid the lease, which took effect in point of interest, and determined by the death of B. (s). So where covenant was brought by the plaintiff, as heir in reversion in fee to his father, on an indenture

(o) See Co. Litt. 352, b.

(p) *Ludford v. Barber*, 1 T. R. 90.

(q) See *Wilks v. Back*, 2 East, 142; *Berkeley v. Hardy*, 5 B. & C. 355.

(r) *Frontin v. Small*, Str. 705.

(s) 1 Inst. 47, b. Acc. *Treport's case*, 6 Rep. 15, a; *Doe v. Seaton*, 2 C. M. & R. 728. The reason of the case in the

of lease for years, made to the defendant by the father, the defendant pleaded, that the father was tenant for life only, and that the lease had determined by his death; on demurrer, judgment was given for the defendant: for that, though, during the father's life, the lessee would have been estopped from saying that the father had not the reversion in him, yet on his death the lease was at an end, and the lessee was not estopped from pleading the truth by confessing and avoiding the lease (*t*). So where the declaration stated, that the plaintiff and his wife demised certain premises to the defendant for years, yielding and paying to him and her, her heirs and assigns, a yearly rent, with a covenant to pay the same to him and her, her heirs and assigns, and then averred that the wife died, and afterwards rent became due to the plaintiff: the defendant pleaded that the premises were the estate of the wife, and that the plaintiff had nothing in them but in right of his wife; that she died, leaving J. S. her heir, whereupon all the estate of the plaintiff ceased, and J. S. threatened to enter and eject defendant, unless he attorned, whereby he was compelled to attorn, and became tenant to J. S. It was held, on demurrer, that the plea was good, and that, some interest having passed by the lease from the plaintiff and his wife, it could not work by estoppel; and that the defendant was therefore entitled to show that the plaintiff's interest had ceased (*u*).

7. *Non est factum.*

There is not any general issue to an action of covenant, but the defendant may plead that the deed (on which the plaintiff has declared,) is not his deed (*x*). This plea puts in issue the execution of the deed in fact only, which it is incumbent, therefore, on the plaintiff to prove. If there be a subscribing witness to the deed, and it is one to the validity of which attestation is requisite, the execution must be proved by such witness (*y*). But payment of money into court on one of the breaches assigned in the declaration dispenses with proof of the execution of the deed, although one of the pleas be the plea of *non est factum* (*z*). By 10 Pl. R. H. T. 1853, "In actions on specialties and covenants, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable."

In covenant, the declaration stated a joint demise by husband and wife. Plea, *non est factum*. It appeared in evidence, that

text is, because tenant for life has a freehold, which is a greater estate, and the lease will not require any estoppel, if the life endure. *Per Holt, C. J., Gilman v. Hoare*, Salk. 275.

(*t*) *Brudnell v. Roberts*, 2 Wils. 143. See *Weld v. Baxter*, 11 Exch. 816; 1 H.

& N. 568 (*in error*).

(*u*) *Hill v. Saunders*, 4 B. & C. 529.

(*x*) Com. Law Proc. Act, 1852, Sched. B. 38.

(*y*) See *post*, "Debt on Bond" "*Non est factum*."

(*z*) *Randall v. Lynch*, 2 Campb. 357.

the husband was tenant for life, with remainder to the wife for life, and that they had jointly demised to the defendant. A motion was made for a new trial, on the ground, that the demise stated was an impossible one: for the husband alone had the power of demising, and the wife could only confirm; but the court discharged the rule: *Blackstone*, J., saying, "The issue is, that there is no such deed as stated in the declaration; if, in fact, such a deed appears, the defendant, who is in possession under it, shall not question the title of the plaintiffs to make such demise, and thereby evade the performance of what he himself has stipulated." And *Nares*, J., said, on the issue of *non est factum* in covenant, the deed only must be proved (a).

An allegation of a demise being by *indenture*, imports that the demise is by an instrument in writing and under seal; consequently to a declaration in covenant upon an *indenture* of lease by the lessor against the assignee of the lessee, a plea, that the indenture was not signed by the plaintiff or by any agent authorized by him in writing, is bad (b).

The declaration (in covenant) stated, that the plaintiff sued the defendant B., the then chairman of the board of directors of a joint-stock company, and set forth an agreement between the plaintiff and the company, sealed with the seal of one J. S., a former chairman, for and on behalf of the company. It was held, that covenant could not be maintained against the defendant (c).

If the plaintiff in his declaration states the covenant by itself in its own absolute terms, without the qualifying context which belongs to it, this being an untrue statement, in point of substance and effect, of the deed, will entitle the defendant to a nonsuit on the ground of variance (d); but it is enough to state truly that part which applies to the breach complained of, if that which is omitted do not qualify that which is stated (e). The declaration set forth a covenant to repair generally. The deed, when produced, contained an exception of fire and other casualties. This was held to be a fatal variance (f).

8. *Non infregit Conventionem* (g).

The plea of *non infregit conventionem*, although formerly bad on special demurrer (h), was held to be aided by verdict (i), and

(a) *Friend v. Eastabrook*, 2 W. Bl. 1152.

(b) *Aveline v. Whisson*, 4 M. & G. 301. See 8 & 9 Vict. c. 106, s. 3, *post*, "*Debt*," "*For Use and Occupation*."

(c) *Hall v. Bainbridge*, 1 M. & G. 42.

(d) *Howell v. Richards*, 11 East, 633; *ante*, p. 512.

(e) *Tempest v. Rawling*, 13 East, 20.

(f) *Tempany v. Burnand*, 4 Campb. 20.

(g) By 11 Geo. I. c. 30, s. 43, in actions upon policies of insurance under the common seal of either the Royal Exchange or London Assurance Companies, the defendants may plead that "*they have not broke the covenants in such policy contained, or any of them.*"

(h) *Hodgson v. The East India Company*, 8 T. R. 278.

(i) *Taylor v. Needham*, 2 Taunt. 278.

would, therefore, since the abolition of special demurrers (*k*), be unobjectionable (*l*). It raises a substantial issue, *e.g.* in an action for non-repair, whether there was a want of repairs or not (*m*).

9. *Payment of Money into Court.*

Money may be paid into court in this action; C. L. P. Act, 1852, s. 70; see *ante*, p. 165, with the form of pleading. It is no answer to an action of covenant for rent, no particular place for payment being mentioned in the deed, that the defendant was on the demised premises, on the day when the rent fell due, ready to pay, if the plaintiff had come to receive it, and that he had always since been ready, &c., concluding by payment of the amount into court (*n*).

10. *Performance.*

If all the covenants be in the affirmative, the defendant may plead, generally, performance of all: but, if any be in the negative, to so many he must plead specially, (for a negative cannot be performed,) and to the rest generally. So if any of the covenants be in the disjunctive, the defendant must show, which of them he hath performed. So, if any are to be done of record, he must show that specially, and cannot involve it in general pleading (*o*). So if a covenant be partly affirmative and partly negative, as where the words of the covenant were, that defendant *decederet, procederet, et non deviet*;—defendant having pleaded performance generally, the plea was held bad (*p*). It has been held that to plead performance otherwise than in the terms of the covenant was bad on general demurrer; *sed quære* (*q*).

11. *Release.*

A contract under seal cannot be varied or discharged by a parol contract. In the case of a covenant the whole matter is under the seal of the party; and the contract into which he has entered can be discharged only by an instrument of the same nature as that by which the contract was created (*r*).

If a man covenant to build a house or to make an estate, and, before the covenant broken, the covenantee releases him by deed

(*k*) Com. Law Proc. Act, 1852, s. 51.

(*l*) And see Com. Law Proc. Act, 1852, s. 76.

(*m*) *Gilbert v. Martin*, 1 Lev. 114.

(*n*) *Haldane v. Johnson*, 8 Exch. 639.

(*o*) 1 Inst. 303, b. The same rule holds in debt on bond, conditioned for the performance of covenants. *Cropwel v. Peachy*, Cro. Eliz. 691.

(*p*) *Laughwell v. Palmer*, 1 Sid. 87, *sed quære*.

(*q*) *Scudamore v. Stratton*, 1 B. & P. 455.

(*r*) *Per Tindal, C. J.*, in *West v. Blake-way*, 2 M. & G. 751. The rule is the same, generally, in equity, although under particular circumstances relief may be obtained. See *Major v. Major*, 1 Drew. 165; *Pearce v. Hains*, 11 Hare, 151; *Money v. Jordan*, 2 De G. M. & G. 318; and in cases of specific performance, notes to *Wooliam v. Hearn*, 2 Tud. L. C. 404 (2nd ed.)

from all *actions, suits, &c.*, this does not discharge the covenant itself; because, at the time of the release, there was not any duty or cause of action in being (*s*). So to covenant for non-payment of rent the defendant cannot plead a release, by the plaintiff, of all demands, at a day before the rent in question became due (*t*). But a release of all *covenants* is a good discharge of the covenant before it is broken (*u*).

In covenant by the assignee of feoffee against feoffor for a breach of covenant to make further assurance (in not levying a fine), the defendant pleaded a release from the *feoffee*, which release bore date *after* the commencement of the action by the assignee; it was held, that although the breach was in the time of the assignee, yet if the release had been by the covenantee, from whom the plaintiff derives, before any breach or before the suit commenced, it had been a good bar to the assignee; but, being in the time of the assignee, and the action having been actually commenced by him, and so attached in his person, the covenantee could not release this action, wherein the assignee was interested (*v*).

An insolvent debtor was formerly held not to be released under the acts then in force from the payment of the arrears of an annuity becoming due, after his discharge, on a covenant made before (*w*). But by 1 & 2 Vict. c. 110, s. 80, the discharge of an insolvent is extended to sums payable by way of annuity, or otherwise, at any future time or times, by virtue of any bond, covenant, or other securities. The act does not apply to debts payable on a contingency (*x*), and which are incapable of valuation (*y*), *e.g.* premiums of insurance which a mortgagee has paid on the default of the mortgagor, and after his discharge, in accordance with a covenant to that effect (*z*), nor to sums paid on behalf of the insolvent, and after his discharge (although due before (*a*)), by his surety (*b*).

12. *Set-off.*

A set-off must be pleaded (*c*). Unliquidated damages, arising from the breach of other covenants to be performed by the plaintiff, cannot be pleaded by way of set-off (*d*). To covenant on an indenture of lease for non-payment of rent, the defendant pleaded, that he covenanted to repair, and to surrender in good repair, "casualties by fire and tempest excepted;" that a stack of chimneys belonging to the house had been thrown down by a tempest,

(*s*) 1 Inst. 292, b.

(*t*) *Henn v. Hanson*, 1 Lev. 99.

(*u*) 1 Inst. 292, b.

(*v*) *Middlemore v. Goodale*, Cro. Car. 503; 2 Roll. Abr. 411; "Release," (D.) pl. 11, S. C.

(*w*) *Cottierel v. Hooke*, Doug. 97; *Marks v. Upton*, 7 T. R. 305.

(*x*) *Lawrence v. Walker*, 3 Dowl. 614.

(*y*) *Brown v. Fleetwood*, 5 M. & W. 19.

(*z*) *Bennett v. Burton*, 12 A. & E. 657.

(*a*) *Abbott v. Bruere*, 5 B. N. C. 598.

(*b*) *Hocken v. Browne*, 4 B. N. C. 400.

(*c*) 10 Pl. R. Hil. T. 1853.

(*d*) *Howlet v. Strickland*, Cowp. 56.

which had damaged the house so much that it would soon have become uninhabitable, if the defendant had not immediately repaired it; that he had been obliged to lay out, in the repairs, a sum of money (exceeding the amount of the rent in arrear,) which the plaintiff became liable to repay to him, and that he was ready to set off the same. On demurrer, it was held, that the plea could not be supported; for, admitting that the defendant could maintain an action against the plaintiff (his landlord), yet the sum to be recovered could only be ascertained by a jury; and consequently, the damages being uncertain, they could not be set off in the present action (*e*).

IX. Evidence.

The evidence to be adduced of course depends upon the pleadings. The most usual plea, *viz.*, that the deed is not the deed of the defendant, has been already discussed. It remains only to remark, that the plaintiff can recover only *secundum allegata et probata*. Hence, where the plaintiff covenanted for a sum of money to build a house within a certain time, and, in an action for non-payment of the money, averred, that the house was built within the time; it was held, that evidence that the time had been enlarged by parol agreement, and the house finished within the enlarged time, did not support the declaration (*f*). So where the breach assigned was, that the defendant had not used the premises in a husband-like manner, but *on the contrary* had committed waste. Plea, that the defendant had not committed waste. At the trial, the plaintiff offered evidence to show, that the defendant had used the premises in an unhusband-like manner, which however did not amount to waste: the judge rejected the evidence; being of opinion, that on this issue it was not competent to the plaintiff to prove anything which fell short of waste, and this opinion was afterwards confirmed by the court (*g*). So in an action on a covenant to keep and deliver up premises in repair, the breach assigned was, that the defendant did not repair or

(*e*) *Weigall v. Waters*, 6 T. R. 488.

(*f*) *Little v. Holland*, 3 T. R. 590. The remedy in such a case, if the work has been accepted, being by an action upon a *quantum meruit* for work, labour, &c. *Lucas v. Godwin*, 3 B. N. C. 737; see *Legge v. Harlock*, 12 Q. B. 1015; or, if the finishing of the house by a certain time be not a condition precedent to the payment of the money, by averring performance of all conditions precedent generally, leaving the defendant to set up the nonfinishing of the house by the agreed date in his plea, and then demurring. Under the same circumstances

in assumpsit the action would lie on the original agreement, and the acceptance of the house would be (*semble*) evidence of a waiver of the condition precedent, even if it were one. *Ripley v. M'Clure*, 4 Exch. 345; or upon a new agreement, the same as the original one, except in the one particular of the time of performance; *Stead v. Dawber*, 10 A. & E. 57; but in covenant no parol waiver or substitution would be valid, *ante*, p. 477, and Sugd. V. & P. 219 (13th ed.)

(*g*) *Harris v. Mantle*, 3 T. R. 307; *Hawkes v. Orton*, 5 A. & E. 367, *acc.*

deliver up in repair, *but*, on the contrary, *suffered* the premises to be ruinous and in decay, *for want of necessary reparations*, &c., and at the end of the term left them so out of repair; it was held, that under this breach the lessor could not recover for *voluntary* waste, as by removing windows, &c. (*h*). So *e converso* on a declaration alleging *voluntary* waste only, the plaintiff cannot recover for *permissive* waste (*i*).

X. Damages—Judgment.

Damages.—Defendant, by a settlement made on his marriage, conveyed estates upon certain trusts, and covenanted with the trustees to pay off incumbrances on the estates, to the amount of 19,000*l.*, within a year; it was held, that on his failing to do so, the trustees were entitled (at law) to recover the whole 19,000*l.* in covenant, though no special damage was laid or proved (*j*). So where, the plaintiff and defendant being joint makers of a promissory note, the defendant as principal and the plaintiff as his surety, the defendant covenanted with the plaintiff to pay the amount to the payee of the note on a given day, but made default, it was held in an action on this covenant, that the plaintiff was entitled to recover the whole amount by way of damages, though he had not in fact paid it (*k*). In the above cases there was a distinct covenant to pay a sum certain; and it is the same where the sum, though not specified, is ascertainable, *e.g.* a covenant to pay the *debts* of A. B. (*l*); but in ordinary covenants of indemnity, where the damages are unliquidated, the actual damage sustained (which is a question for the jury) can only be recovered (*m*).

Defendant had conveyed premises to the plaintiff under a covenant for good title. An action was afterwards brought against the plaintiff by a party having better title, and the plaintiff compromised it for a large sum. It was held, that in an action for breach of the covenant for good title, the plaintiff might recover the whole sum so paid, and also his costs as between attorney and client, in the compromised suit, a covenant for title being a contract of indemnity (*n*); and this, although he had not given any notice of that suit to the defendant, for the only effect of want of notice in such a case is to let in the party called upon for an indemnity, to show that the plaintiff has no claim in respect of the alleged loss, or not to the amount alleged, or that he made an improvident

(*h*) *Edge v. Pemberton*, 12 M. & W. 187.

(*i*) *Martin v. Gilham*, 7 A. & E. 540.

(*j*) *Lethbridge v. Mylton*, 2 B. & Ad. 772.

(*k*) *Loosemore v. Radford*, 9 M. & W. 657.

(*l*) *Carr v. Roberts*, 5 B. & Ad. 73.

(*m*) *Walker v. Broadhurst*, 8 Exch. 889.

(*n*) Such a contract extends to "all such charges as necessarily and reasonably arise out of the circumstances under which the party charged became responsible." *Per Pollock*, C. B., *Smith v. Howell*, 6 Exch. 737. See *per Parke*, B., *Tindal v. Bell*, 11 M. & W. 232.

bargain, and that the defendant might have obtained better terms, if the opportunity had been given him (o). A lessee having a covenant by the lessor for quiet enjoyment defended unsuccessfully an action of ejectment by a person claiming under the lessor; the lessee gave notice to his lessor of the action, of which the latter took no notice. In an action on the covenant it was held that the lessee was entitled to recover all the costs of the ejectment, as well as damages for the loss of the land and the value of a conservatory he had erected (p). But where premises were demised to the plaintiff, who covenanted to repair and subsequently underlet the premises in question to a person, who entered into a similar covenant with him to repair, and the original lessors brought an action against the plaintiff for non-repair, and recovered; it was held, that the plaintiff could not recover over from his lessee, as damages, the costs which he had incurred in defending the former action brought against him by his lessors (q).

Judgment.—The judgment is for the recovery of the damages sustained (r). If the defendant has judgment against him upon nil dicit, confession, or demurrer, a writ of inquiry shall be awarded to inquire of the damages (s). Where the breach was assigned on two covenants, the plaintiff having a good cause of action on one only; and there was a verdict for the plaintiff on both, and damages entirely assessed, it was held that the plaintiff could not have judgment (t). Covenant was brought against two defendants for not building a house; one suffered judgment by default, the other pleaded performance, which was found for him: it was held, that the plaintiff could not have a writ of inquiry or judgment against the defendant who had suffered judgment by default; because, the covenant being joint, and the performance of it having been established by the verdict, it appeared that the plaintiff had not any cause of action (u).

If on the whole record it appears, that the defendant has committed a breach of the covenant declared on, although the plaintiff states his real *gravamen* informally, judgment cannot be arrested; for, however defective the pleadings are, the court are bound *ex officio* to give such judgment as the law requires them to do. Thus, where A. declared that B., before her intermarriage with C., covenanted with him to leave certain matters to arbitration, and to *abide by the award*, and then averred that *after* the making of the indenture and the intermarriage of the defendants, the arbitrator

(o) *Smith v. Compton*, 3 B. & Ad. 407.
See *Short v. Kalloway*, 11 A. & E. 28.

(p) *Rolph v. Crouch*, L. R. 3 Exch. 44; 37 L. J. Ex. 8.

(q) *Walker v. Hatton*, 10 M. & W. 249. He should, it seems, have suffered judgment by default. *Smith v. Howell*,

6 Ex. 737.

(r) *Townesend*, 2 Bk. Judg. 55.

(s) *Barker v. Thorold*, 1 Wms. Saund. 47.

(t) *Anon.*, Cro. Eliz. 685.

(u) *Porter v. Harris*, 1 Lev. 63.

awarded B. to pay a certain sum; assigning for breach the non-payment of the sum so awarded; it was held, that, although the plaintiff could not recover, on the breach assigned, for the non-payment of the sum awarded, because by the marriage the authority of the arbitrator was countermanded, yet that as by the marriage B. had put it out of the power of the arbitrator to make an award binding upon her, her covenant to abide the award was broken, and judgment ought not to be arrested (*x*). But where the declaration stated that the defendant covenanted to abide by an award, but subsequently refused to pay the sum awarded, and the defendant pleaded that before the award he revoked the authority of the arbitrator, it was held that the defendant was entitled to judgment; and the case of *Charnley v. Winstanley* was distinguished, for in that case there was a good breach of covenant disclosed, though informally, in the plaintiff's declaration, whereas here it only appeared from the defendant's plea, that he had broken his covenant (*y*); and it is a general rule that the court can only give such judgment as the law requires upon the whole record, with respect to the cause of action *there* stated. It will not pick out of various parts of the record a different cause of action from that for which the plaintiff proceeds (*z*).

(*x*) *Charnley v. Winstanley*, 5 East, 266.

(*y*) *Marsh v. Bulteel*, 5 B. & Ald. 507.

(*z*) *Per Lord Denman, C. J., Head v. Baldrey*, 6 A. & E. 469.

CHAPTER XIV.

DEBT.

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I. *Of the Action of Debt, and in what Cases it may be maintained.*

An action of debt lies for the recovery of a sum certain upon simple contract, bond, other specialty, or record; for rent arrear (*a*); upon a statute by the party grieved, or common informer. If a statute prohibit the doing an act under a certain penalty, but does not prescribe any mode for recovering the penalty, the party entitled may recover the penalty by action of debt (*b*). Debt also lies for the recovery of a sum of money due under an award (*c*); for an amercement in a court leet (*d*), or court baron (*e*); for a fine upon admittance to a copyhold (*f*). So on the decree of a colonial court for payment of the balance due on a partnership account (*g*); even though the colonial court be a court of equity only; if the decree be one simply ascertaining a balance, and ordering payment of it by the defendant to the plaintiff (*h*). So on a decree of the Court of Session in Scotland, ordering the payment of costs incurred in a divorce suit there (*i*). But debt will not, it seems, lie for money ordered to be paid by a decree of a court of equity in this country for interest and costs on a bill filed for a specific performance (*k*).

An absolute covenant to pay a sum certain on a given day is a good foundation for an action of debt. Hence, debt lies on an absolute covenant by A. to pay on a certain day a sum certain due from B. on mortgage (*l*). So where the plaintiff declared in debt on a deed, whereby the defendant covenanted to pay the plaintiff so much per hundred for every hundred stacks of wood in such a place, and bound himself in a penalty for the performance: it was

(*a*) *Newcomb v. Harvey*, Carth. 161.

(*b*) 1 Roll. Abr. 598, pl. 18, 19.

(*c*) Adm. 2 Saund. 66.

(*d*) *Wicker v. Norris*, Bull. N. P. 167.

It must be proved at the trial that the defendant was an inhabitant, as well at the time of the amercement as of the offence. *Ibid*.

(*e*) *Hodsen v. Harridge*, 2 Saund. 66.

(*f*) *Wheeler v. Honor*, 1 Sid. 58.

(*g*) *Henley v. Soper*, 8 B. & C. 16.

(*h*) *Henderson v. Henderson*, 13 L. J., Q. B. 274; 6 Q. B. 288.

(*i*) *Russell v. Smyth*, 9 M. & W. 810.

(*k*) *Carpenter v. Thornton*, 3 B. & Ald. 52; but see the remarks of Lord Denman, C. J., in *Henderson v. Henderson*.

(*l*) *Evans v. Jones*, 5 M. & W. 295.

averred, that there were so many stacks, which amounted to a sum exceeding the penalty, for which sum the plaintiff brought his action. It was objected that the proper form of action was covenant, and not debt; but *per Cur.*, the plaintiff may have covenant or debt at his election; for, the rate being certain, when the defendant has the wood, the agreement becomes certain, for which debt lies (*m*).

But it is quite a different case where there is a collateral and independent covenant to pay the debt of another person on non-performance by him; as where an action was brought on a covenant, by which the defendant, jointly with another, undertook to secure the payment of an annuity issuing out of land, it was held, that the defendant was only suable in covenant, and not in debt, the primary duty of payment being on the terre-tenant (*n*). So where the covenant declared on was, that A. and B. (a stranger to the deed); or one of them, would pay, it was held that this was, in effect, a covenant by A. to pay on default of B., and that debt would not lie against A. (*o*). Where, however, in a similar case B. was a party to the deed, it was held that such a covenant was, in effect, a joint and several covenant by A. and B. to pay, and therefore that debt would lie against A. (*p*).

In the action of debt, the plaintiff is to recover the sum *in numero*, and not a compensation in damages, as in those actions which sound in damages only; such as assumpsit, &c. (*q*). The damages given in the action of debt, for the detention of the debt, are merely nominal.

II. Debt on Simple Contract.

Debt lies upon a simple contract, either express or implied (*r*), to pay a sum certain (*s*). Where goods are sold for ready money, and payment is made accordingly, no debt arises: and such payment is therefore, it would seem, provable under the general issue (*t*). It is safer, however, to plead payment in such a case (*u*). Debt lies by the payee against the maker of a promissory note, or by the drawer of a bill payable to himself against the acceptor (*x*), or by the indorsee of a bill against his immediate indorser (*y*); for an action of debt will lie, where the debt has been transferred from one party to a bill to another *between whom privity exists* (*z*); but

(*m*) *Ingledeu v. Cripps*, *Ld. Raym.* 814.

(*n*) *Randall v. Rigby*, 4 *M. & W.* 130.

(*o*) *Harrison v. Matthews*, 10 *M. & W.*

768.

(*p*) *Caldwell v. Becke*, 2 *Exch.* 318.

(*q*) *Bull. N. P.* 167.

(*r*) *Speake v. Richards*, *Hob.* 206.

(*s*) "Indebitatus assumpsit will not lie

in any case except where debt lies." *Hard's case*, *Salk.* 23. See *ante*, p. 81.

(*t*) *Bussey v. Barnett*, 9 *M. & W.* 312.

(*u*) *Littlechild v. Banks*, 7 *Q. B.* 739.

(*x*) *Hatch v. Traves*, 11 *A. & E.* 702.

(*y*) *Watkins v. Wake*, 7 *M. & W.* 488.

(*z*) See *Priddy v. Henbrey*, 1 *B. & C.* 674.

where there is no privity between the parties, debt cannot be maintained; hence, debt does not lie for the indorsee against the acceptor of a bill of exchange (*a*); for, though the acceptance binds by the custom of merchants, yet it does not create a *debt* between the acceptor and any parties to the bill subsequent to the drawer. So where the drawer of a bill indorses it in blank, and delivers it to A., who transfers it by delivery, and without a fresh indorsement to B., B. cannot maintain an action of debt on it against the drawer, for in such a case there is no privity of contract (*b*). Debt will not lie on a promissory note payable by instalments until the last day of payment be past, for a contract to pay a certain sum on several days of payment is considered as one contract, and for one contract there should be but one action (*c*). Nor will it lie for a wager, for there is no consideration (*d*).

Debt lies upon a foreign judgment; as upon a judgment of the Supreme Court of Jamaica; and, in an action of this kind it is not necessary for the plaintiff to state the grounds of the judgment, the judgment being of itself *prima facie* evidence of a simple contract debt (*e*) (see *ante*, p. 84); and the pendency of an appeal is no bar to an action upon the judgment (*f*). To support an action on a foreign judgment it used not to be sufficient to prove the judge's handwriting subscribed to it; the seal affixed thereto must also have been authenticated (*g*); or evidence must have been given that the court had not any seal; and then the judgment might have been established by proving the signature of the judge (*h*). A copy of a foreign judgment, purporting to be signed by the clerk of the court, and certified by him to be true, accompanied by the certificate of a notary public of his being the clerk of the court, and by another certificate of the governor, under the seal of the island, that the person so certifying was a notary public, was held insufficient (*i*). But now, by 14 & 15 Vict. c. 99, s. 7, "all judgments, decrees, orders, and other judicial proceedings of any court of justice in any foreign state, or in any British colony, and all affidavits, pleadings, and other legal documents filed or deposited in any such court, may be proved either by examined copies or by copies *purporting* either to be sealed with the seal of the foreign or colonial court to which the original document belongs; or in the event of such court having no seal, to be signed

(*a*) *Powell v. Ancell*, 3 M. & G. 171.

(*b*) *Lewin v. Edwards*, 9 M. & W. 720.

(*c*) *Rudder v. Price*, 1 H. Bl. 547.

(*d*) *Bovey v. Castleman*, Ld. Raym. 69.

(*e*) *Walker v. Witter*, Doug. 1.

(*f*) *Munroe v. Pilkington*, 31 L. J. Q. B. 81; 2 B. & S. 11. A plea of judgment recovered must show that the judgment so recovered is final and conclusive be-

tween the parties by the law of the place.

(*g*) *Henry v. Adey*, 3 East, 221; but see *Anon.*, 9 Mod. 66, that the common seal of a foreign court authenticates itself.

(*h*) *Alves v. Bunbury*, 4 Campb. 28.

(*i*) *Appleton v. Lord Braybrook*, 6 M. & S. 34; and see *Brown v. Thornton*, 6 A. & E. 191; *Alvon v. Furnivall*, 1 C. M. & R. 277.

by the judge, and such judge shall attach to his signature a statement in writing on the said copy that the court whereof he is a judge has no seal, which copies shall be admitted in evidence without any proof of the seal or signature or of the judicial character of the person appearing having made such signature and statement." In debt on the judgment of an inferior court the declaration must contain an averment, that the cause of action arose within the jurisdiction of the inferior court, otherwise it will be bad on demurrer (*j*). It will not suffice to allege that the plaintiff recovered his damages within that jurisdiction.

It is not necessary that the sum claimed in the declaration should be the same as that indorsed on the writ. The sum claimed may be more (*k*) or less (*l*) than that indorsed. But it is advisable to indorse the real sum due, for if the sum indorsed be so much more than the sum due as to mislead the defendant and prevent him from settling the action, proceedings might be stayed after the four days, on payment of the real debt with costs of the writ only (*m*); if it be less, proceedings would be stayed on payment of the sum indorsed and costs within four days, unless an amendment were allowed, which would be at the costs of the plaintiff.

"With every declaration (unless the writ has been specially indorsed under the provisions contained in the 25th section of the C. L. P. Act, 1852), delivered or filed, containing causes of action such as those set forth in Sched. B. of that act, and numbered from 1 to 14 inclusive" (*i. e.*, the *indebitatus* counts), "the plaintiff shall deliver or file full particulars of his demand under such claim, where such particulars can be comprised within three folios, and where the same cannot be comprised within three folios, he shall deliver or file such a statement of the nature of his claim, and the amount of the sum or balance which he claims to be due, as may be comprised within that number of folios;" 19 R. G. H. T. 1853.—The rule is not imperative; but if the plaintiff omit to deliver particulars, he will not be allowed for them in costs, if afterwards called for and delivered.

Where in debt on simple contract the defendant to part of the declaration pleads payment or set-off of a certain sum, he must prove payment or set-off of that sum in order to entitle him to an entire verdict on that plea (*n*). So, if he plead payment or set-off to the whole declaration he must prove enough to cover the plaintiff's real demand (*o*). But the pleas may be taken distributively, and the issue found for the defendant as to the amount proved to

(*j*) *Read v. Pope*, 4 Tyrw. 403; 1 C. M. & R. 302.

(*k*) *Bowdidge v. Slaney*, 2 B. N. C. 142.

(*l*) *M'Quillin v. Cox*, 1 H. Bl. 249.

(*m*) *Elliston v. Robinson*, 2 Cr. & M. 343.

(*n*) *Cousins v. Paddon*, 2 C. M. & R. 560.

(*o*) *Falcon v. Benn*, 2 Q. B. 314.

be paid or due from the plaintiff to him, and as to the residue for the plaintiff (*p*). And now, by s. 75 of the C. L. P. Act, 1852,—“Pleas of payment and set-off, and all other pleadings capable of being construed distributively, shall be taken distributively, and if issue is taken thereon, and so much thereof as shall be a sufficient answer to part of the causes of action proved shall be found true by the jury, a verdict shall pass for the defendant in respect of so much of the causes of action as shall be answered, and for the plaintiff in respect of so much of the causes of action as shall not be so answered.”

But if several pleas are pleaded, each to the whole declaration, which, though separately insufficient, when taken together, cover the whole cause of action, the entire verdict should be entered for the defendant (*q*). The defendant, however, cannot for this purpose call in aid a defence arising *after action brought*. Therefore, where to declaration in debt the defendant pleaded to the whole declaration, 1. never indebted; 2. set-off; 3. as to 4*l.*, parcel, &c., payment *after action brought*; and 4. to the whole declaration a defence under the Tipling Act, and the set-off proved was less than the plaintiff's claim as it stood at the commencement of the suit, but exceeded it if the payment of the 4*l.* after action brought was taken into account, it was held that the plaintiff was entitled to a verdict with nominal damages on the plea of set-off (*r*).

III. Debt on Bond.

If a bond be dated on a day certain, with a penalty conditioned for the payment of a lesser sum, and no day be fixed for the payment of the lesser sum, such sum is payable on the day of the date; and if an action be brought upon the bond, the court will refer it to the master to compute principal, interest and costs, and, on payment of the same, will stay the proceedings under 4 Ann. c. 16, s. 13 (*s*). Interest will become due on such bond, although not expressly reserved, and is to be computed from the day on which the money secured by the bond becomes payable, *viz.* the day of the date (*t*); but if the obligor receive the principal he cannot afterwards recover the interest (*u*).

The above section enacts,—“That if at any time pending an action upon any such bond,” (*i. e.* a bond “which hath a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain,”) “with a penalty, the defendant

(*p*) *Cousins v. Paddon*, 2 C. M. & R. 560.

(*q*) *Per Alderson, B.*, in *Kilner v. Bailey*, 5 M. & W. 385.

(*r*) *Spradbery v. Gillam*, 6 Exch. 422.

(*s*) *Farquhar v. Morris*, 7 T. R. 124.

See *Nose v. Bacon*, Cro. Eliz. 798.

(*t*) *Farquhar v. Morris*, *supra*.

(*u*) *Dixon v. Parkes*, 1 Esp. 109; but see *Lumley v. Musgrave*, 4 B. N. C. 9; *Hellier v. Franklin*, 1 Sta. 291.

shall bring into the court, where the action shall be depending, all the principal money and interest due on such bond, and also all such costs as have been expended, in any suit or suits in law or equity (*v*), upon such bond, the said money so brought in shall be deemed and taken to be in full satisfaction and discharge of the said bond, and the court shall and may give judgment to discharge every such defendant of and from the same accordingly."—This section does not authorize a *plea* of payment into court, but only a summary application to the court (*w*). The "principal money" mentioned, means the sum due by the condition; but where that is payable by instalments, and default is made in the payment of one instalment, even through inadvertence (*x*), the bond is forfeited, and the court will not stay proceedings on payment of the instalment and costs (*y*); but although judgment may thus be entered up for the whole, execution will be stayed on payment of the instalment (or interest) and costs (*z*). *Secus*, if the whole be made due on the non-payment of one instalment, or interest (*a*).

Where the condition is general, to pay a sum of money with interest, no demand is necessary (*b*); but if by the condition the money is payable on demand, a demand must be proved (*c*). At law the penalty is the debt, and interest cannot be recovered beyond it (*d*), except under special circumstances, as where the obligor has, by vexatious proceedings, delayed the obligee from recovering (*e*). In an action upon the bond, interest cannot be recovered beyond the penalty (*f*); but, after judgment recovered, *transit in rem judicatam*; the nature of the demand is altered, and in an action on the judgment, it is competent to the jury to allow interest to the amount of what is due, although such amount exceed the penalty of the bond and costs of the judgment; and in this respect there is not any difference between a foreign judgment and a judgment in a court of record here (*g*).

If a person be bound to pay a sum certain on several days, the obligee cannot maintain an action of *debt* until the last day be past (*h*). But upon a bond with a penalty conditioned to pay

(*v*) See *Lock v. Shermer*, Ca. Temp. Hardw. 116.

(*w*) *England v. Watson*, 9 M. & W. 333.

(*x*) *Vansandau v. —*, 1 B. & Ald. 214.

(*y*) *Tighe v. Crafter*, 2 Taunt. 387.

(*z*) *Massen v. Touchet*, 2 W. Bl. 706.

(*a*) *Gowlett v. Hansforth*, 2 W. Bl. 938.

(*b*) *Gibbs v. Southam*, 5 B. & Ad. 911.

(*c*) *Carter v. Ring*, 3 Campb. 459.

(*d*) *Branscomb v. Scarbrough*, 6 Q. B. 13. The rule is the same in equity. *Hughes v. Wynne*, 1 My. & K. 20.

(*e*) *Grant v. Grant*, 3 Sim. 340. See *Ram on Assets*, 701.

(*f*) *Wilde v. Clarkson*, 6 T. R. 303.

(*g*) *M'Clure v. Dunkin*, 1 East, 436.

(*h*) *Rudder v. Price*, 1 H. Bl. 547. But on a covenant or promise to pay a sum of money by instalments, an action of *covenant* or *assumpsit* will lie immediately on the non-payment of the first instalment, for the covenant or promise is broken as often as there is a default in payment. 1 Inst. 292, b.; *Milles v. Milles*, Cro. Car. 241. So if money is awarded to be paid at different days, *assumpsit* will lie on the award for each sum as it becomes due, *toties quoties*. *Cooke v. Whorwood*, 2 Wms. Saund. 337. The same rule holds in respect of duties which touch the realty. 1 Inst. 292, b.

several sums of money at different days, debt will lie immediately on default of payment at either of the days, for the condition is thereby broken, and consequently the bond becomes absolute (*i*). And this rule holds, although the condition of the bond does not expressly provide, "that in default of payment at any of the said times, the bond shall be in force" (*k*). If A. enter into a bond to pay money on two several contingencies, the obligee may maintain debt on the happening of either contingency (*l*). If an instalment of an annuity, secured by bond, be not paid on the day, the bond is forfeited, and the penalty is the debt in law, for which judgment may be entered, which shall stand as a security for the growing arrears of the annuity (*m*).

It would not seem necessary to state in the declaration the place of date of a bond, even if made abroad (*n*); such an action being transitory (*o*): and the statement formerly held sufficient in such cases: *e. g.* "at Amsterdam in Holland, to wit in the parish of St. Mary in London" (*p*), not being traversable (*q*).

Of the Pleas.

1. General Issue, *Non est factum*, and Evidence thereon.

The general issue to an action of debt on bond is *non est factum*, because the action is grounded upon the specialty. By 10 Pl. R. H. T., 1853, "in actions on specialties and covenants, the plea of *non est factum* shall operate as a denial of the execution of the deed in point of fact only, and all other defences shall be specially pleaded, including matters which make the deed absolutely void, as well as those which make it voidable."—Thus coverture or lunacy at the time of the execution, or, that the bond was delivered as an escrow, or, that the defendant was made to execute it when he was so drunk that he did not know what he did, must be pleaded specially.

It is not now necessary to make *profert* of any deed mentioned or relied upon in pleading, nor, if made, does it entitle the opposite party to *oyer* (Common Law Procedure Act, 1852, sect. 55); but a party pleading in answer to any pleading in which any document is mentioned or referred to, is at liberty to set out the whole or the material parts thereof, which matter is to be taken as part of the pleading in which it is set out, sect. 56. If the deed be misrecited or not truly set out, the opposite party ought, it would seem, to pray to have the bond and condition, or either (as

(*i*) *Coates v. Hewit*, 1 Wils. 80.

(*k*) *Coates v. Hewit*, *ubi sup.*

(*l*) *Sayer v. Glean*, 1 Lev. 54.

(*m*) *Judd v. Evans*, 6 T. R. 399.

(*n*) *Houiet v. Morris*, 3 Campb. 303.

(*o*) *Brown v. Hedges*, cited 1 Str. 614.

(*p*) *Dutch West India Company v. Moses*, 1 Str. 612.

(*q*) And see Com. Law Proc. Act, 1852. Sched. A, form 4.

the case may be), enrolled (or, *semble*, himself to set them out *ipsissimis verbis*), and then demur (*r*), or move to quash the plea (*s*).

Upon the issue of *non est factum*, the plaintiff must prove the execution of the bond *by the defendant*. Proof that one, who called himself D., executed, is not sufficient, if the witness did not know it to be the defendant (*t*). Upon this issue, the question is, whether it was the plaintiff's or defendant's deed respectively at the time it is pleaded as such (*u*). Thus, where to a plea of release of the defendant, the plaintiffs replied *non est factum*, on which issue was joined, it was held, that the issue was proved for the defendant, by the production of the deed in a cancelled state, which had operated as a release, it having been cancelled by the releasee after plea pleaded but before issue joined (*x*). An objection that the bond was executed by the defendant in a name other than his own, and other than one by which he was known at the time of the execution, (if available at all,) is not available to the defendant under the plea of *non est factum* (*y*).

To prove the execution of a bond, the sealing *and* delivery must be proved. Proof of the sealing only is not sufficient. Hence, in a case (*z*) where the jury found that the defendant sealed the bond and cast it upon the table, and the plaintiff took it without any other delivery, or any other thing amounting to a delivery, the court were of opinion, that this was insufficient; observing, that it was not like the case which had then lately been adjudged (*a*), where the obligor had sealed the bond, and cast it upon the table, saying, "This will serve," which was held a good delivery; because, from the expressions used by the obligor, it appeared to be his intention that it should be his deed. If the obligor says to the obligee, "It is sufficient for you," or, "Take it as my deed," or the like words, it is a sufficient delivery (*b*). In *Talbot v. Hodson*, 7 Taunt. 250, however, it was held, that evidence of signing by the party by whom the deed purported to be sealed and delivered, was evidence sufficient to warrant the jury in inferring the sealing and delivery.

If a person deliver a writing sealed *to the party to whom it is made*, as an escrow, that is, to be his deed upon certain conditions, that is an absolute delivery of the deed, being made to the party him-

(*r*) Com. Dig. Pleader, P. 1; *Ferguson v. Mackreth*, 4 T. R. 371, n.

(*s*) *Kepp v. Wiggett*, 6 C. B. 280. It was held in *Gunter v. Smith*, Peake Ad. Ca. 1, that where the plaintiff omitted to take either of these courses, and replied generally, the defendant was entitled to a verdict for the variance, under the plea of *non est factum*.

(*t*) *Memot v. Bates*, Bull. N. P. 171.

(*u*) *Whelpdale's case*, 3rd Res. 5 Rep. 119; *Michael v. Scorkwith*, Cro. Eliz. 120.

(*x*) *Todd v. Emly*, 11 M. & W. 1.

(*y*) *Williams v. Bryant*, 5 M. & W. 447.

(*z*) *Chamberlain v. Stanton*, Cro. Eliz. 122; 1 Leon. 140.

(*a*) 1 Inst. 36, a,

(*b*) *Ibid*.

self (c). But a deed may be delivered to a stranger as an escrow (d). It is not necessary that the delivery of a deed as an escrow should be by express words; although it is in form an absolute delivery, yet if it can reasonably be inferred from the facts attending the execution, that it was delivered, not to take effect as a deed until a certain condition was performed, (which is a question of fact for the jury (e),) it will operate as an escrow (f). Where, therefore, A. agreed to let premises to B. for a term of years, B. paying 100*l.* for the fixtures, and a lease was prepared and engrossed, but B. only paid 50*l.* down, and it was then agreed that B. should be let into possession as tenant from year to year, on the terms of the intended lease, until he paid the balance of the 100*l.*; at the same time A. signed, sealed, and delivered the lease, without using any words qualifying the delivery in any way, retaining it, however, in his own possession; it was held, that the circumstances warranted an inference, in fact, that it was agreed between the parties at the time of the execution of the instrument, that it should not operate as a lease until the payment (g).

Where a party to any instrument seals it, and declares, in the presence of a witness, that he delivers it as his deed, but keeps it in his own possession, and there is nothing to qualify that, or to show that the executing party did not intend it to operate immediately, except the keeping the deed in his hands, it is a valid and effectual deed; and delivery to the party who is to take by the deed, or to any person for his use, is not essential (h). So delivery to a third person for the use of the party in whose favour the deed is executed, where the grantor parts with all control over the deed, makes the deed effectual, although the person to whom the deed is so delivered be not the agent of the party for whose benefit the deed is made. *S. C.*

The following was the law as to proving deeds before the C. L. P. Act, 1854:—If there were a subscribing witness to the bond who was living, who could be found, and who was capable of being examined, such witness was alone competent to prove the execution; because he might know and be able to explain the circumstances of the transaction, of which a stranger might be ignorant. The confession or acknowledgment of the party executing the bond would not dispense with this testimony (i). Even the admission of the obligor of the execution of a bond, in an answer to a bill in Chancery filed for the express purpose of obtaining such admission, was held insufficient without evidence to account for the non-pro-

(c) *Ibid.* But see *Gudgen v. Bessett*.

(d) 1 Inst. 36, a.

(e) *Murray v. Earl of Stair*, 2 B. & C. 82.

(f) *Bowker v. Burdekin*, 11 M. & W. 147.

(g) *Gudgen v. Bessett*, 6 E. & B. 986. The objection that it was delivered to the party himself does not seem to have been argued by counsel.

(h) *Doe v. Knight*, 5 B. & C. 671.

(i) *Abbott v. Plumbe*, Doug. 215.

duction of the subscribing witness (*k*). Nor could this rule be dispensed with, even where the instrument was not the foundation of the action, but only given in evidence collaterally. See *Per* Lord *Alvanley*, C. J., in *Manners v. Postan*, 4 Esp. 240. And it was not sufficient ground for receiving evidence of the handwriting of a witness (which would be receivable if he were dead) that he was unable to attend the trial from illness, and lay without hope of recovery (*l*). But in a case where the defendant's attorney had admitted the signature of the defendant, and the subscribing witness to the bond, Lord *Ellenborough* ruled, that this must be taken as a presumptive admission of all the subscribing witness professed to attest, and would have been called to prove, and consequently, that it was not necessary to bring proof of delivery (*m*). It was not necessary that the subscribing witness should actually see the party execute the bond; for where the witness was in an adjoining room, and the obligor, after the execution, brought the bond to the witness, and said that he had executed it, and desired the witness to subscribe his name as a witness, which he accordingly did, this was held sufficient (*n*). If there were two or more subscribing witnesses, it was only necessary to call one of them.

If it could be proved that the subscribing witness was at the time of trial dead, or had become insane (*o*), or blind (*p*), or was absent in a foreign country (*q*), whether domiciled abroad or only absent for a temporary purpose (*r*), or was out of the jurisdiction of the court, *e. g.* in Ireland (*s*), or was serving in the navy *somewhere* (*t*), or that a commission of bankruptcy had issued against him, to which he had never appeared (*u*), or generally that intelligence could not be obtained of him, after reasonable inquiry had been made (*x*) (and *semble*, that circumstances evidencing the *bona fides* of the transaction might render a slighter search sufficient than would be required under circumstances of suspicion (*y*),) proof of his handwriting would in such cases have been sufficient.

In debt on bond, without defence; *Willes*, C. J., said, "If both witnesses to the bond are dead, one would think the plaintiff ought to prove the obligor's hand; but the established rule of evidence is otherwise, and it is sufficient for the plaintiff to prove both the witnesses dead, and the hand of one of them" (*z*). So where a

(*k*) *Call v. Dunning*, 4 East, 58.

(*l*) *Harrison v. Blades*, 3 Campb. 457; *Doe v. Evans*, 3 C. & P. 221. Application to postpone the trial should be made in such a case.

(*m*) *Milward v. Temple*, 1 Campb. 375.

(*n*) *Parke v. Mears*, 2 B. & P. 217.

(*o*) *Currie v. Child*, 3 Campb. 283.

(*p*) *Wood v. Drury*, 1 Ld. Raym. 734; *Pedler v. Paige*, 1 M. & Rob. 258; but see *Crank v. Frith*, 2 M. &

Rob. 262.

(*q*) *Oghlan v. Williamson*, Doug. 93.

(*r*) *Prince v. Blackburn*, 2 East, 250.

(*s*) *Hodnett v. Forman*, 1 St. 90.

(*t*) *Parker v. Hoskins*, 2 Taunt. 223.

(*u*) *Wardell v. Fermor*, 2 Campb. 282.

(*x*) *Burt v. Walker*, 4 B. & Ald. 697.

(*y*) *Crosby v. Percy*, 1 Taunt. 364.

(*z*) *Tomlins v. Talbot*, London Sitings, C. B. M. 18 Geo. II. MS. 10 Leeds, 202, part of Serjt. Hill's collection in Lincoln's Inn library

bond is attested by two witnesses, and one was dead, and the other beyond the reach of the process of the court, proof of the handwriting of the witness that was dead was sufficient (a). And the rule held, even where the party executing the deed signed by a mark only, for of secondary evidence there are no degrees (b). Lord *Kenyon* held it necessary, in cases of this kind, to prove the handwriting of the obligor, as well as the handwriting of the subscribing witness (c). In a subsequent case, a nonsuit directed by Lord *Loughborough*, on the ground that the handwriting of the obligor was not proved, was set aside by the court, and a new trial granted (d); and *Buller*, J., held, "that the handwriting of the obligor need not be proved; that of the subscribing witness, when proved, is evidence of every thing on the face of the paper, which imports to be sealed by the party" (e). In neither of the above cases, however, does the question of identity seem to have been discussed, and the same may be said of two other cases (f), where the only point made was, whether, if the subscribing witness were abroad or could not be found after reasonable inquiry, evidence of his handwriting was admissible, and it was held that it was. Where the objection that evidence of the subscribing witness's handwriting was no proof of the identity of the defendant, was taken, Lord *Tenterden* and *Best*, C. J., held that no further evidence was required (g); but in an action on a promissory note, Mr. J. *Bayley* said,—“It is laid down in Mr. Phillips's Treatise on the Law of Evidence, that proof of the handwriting of the attesting witness is in all cases sufficient. I always felt this difficulty, that that proof alone does not connect the defendant with the note. If the attesting witness himself gave evidence, he would prove not merely that the instrument was executed, but the identity of the person so executing it; but proof of the handwriting of the attesting witness establishes merely, that some person assuming the name which the instrument purports to bear, executed it, and it does not go to establish the identity of that person” (h). And this doctrine was finally established by *Whitlocke v. Musgrove*, 1 Cr. & M. 511, where it was held, that, although the handwriting of the party need not necessarily be proved (for that is but one, among many, methods of proving identity (i)), still that the naked evidence of the hand-

(a) *Adam v. Kerr*, 1 B. & P. 360.

(b) *Mitchell v. Johnson*, M. & Malk. 176.

(c) *Wallis v. Delaney*, 7 T. R. 266, n.

(d) *Gough v. Cecil*, C. B. Trin. 24 Geo. III., Serjt. Hill's MS. 21, p. 78; 1 *Luders on Elections*, p. 317, S. C.

(e) *Adam v. Kerr*, 1 B. & P. 360.

(f) *Cumtiffe v. Seton*, 2 East, 183, and *Prince v. Blackburn*, *ibid.* 250.

(g) *Page v. Mann*, M. & M. 79, and *Kay v. Brookman*, *ibid.* 286.

(h) *Nelson v. Whittall*, 1 B. & Ald. 19.

(i) Others are—that the defendant was present when the instrument was prepared, *Nelson v. Whittall*; to prove assets, that a person bearing the same character as the party sued, e. g., as administrator of A. B., had admitted assets in an answer to a bill in Chancery; *Hennell v. Lyon*, 1 B. & Ald. 182; and see *Simpson v. Dismore*, 9 M. & W. 47; by applications for payment answered by defendant, or other acknowledgments by him; per *Bayley*, J., in *Whitlocke v. Musgrove*; that the party who is proved to have executed the instrument, from

writing of the subscribing witness is not sufficient to fix a defendant in such case; and that reasonable evidence must be given of the identity of the party sued with the party executing the instrument.

Thus, where in an action on a bond against H.; plea, *non est factum*; the subscribing witness stated that he saw it executed by a person who was introduced as H., but he could not identify the person in question with the defendant, the plaintiff was nonsuited (*k*). So where, in an action against Hugh Jones, the subscribing witness stated, that he saw the signature written by a person of the name of Hugh Jones, whose occupation and residence he described, but that he had had no communication with him since, and that the name was very common in that neighbourhood; it was held, that there was no evidence to go to the jury of the identity of the defendant (*l*). So where the witness stated that the handwriting was that of "J. S. of B, a woolstapler," but also that he knew another J. S. of the same place, also a woolstapler, the court inclined to think there was no evidence of the identity of the defendant (*m*). By 26 Geo. III. c. 57, s. 38, deeds exchanged in the East Indies and attested by witnesses *there* are made evidence on proof of the handwriting of the parties and of the witnesses, and also that the witnesses are resident in the East Indies.

If the subscribing witness denied having seen the deed executed, the case stood as if there had been no subscribing witness, and other evidence might be admitted (*n*); *e. g.* by proving the handwriting of the party (*o*).

Such was the old law upon the subject, but now, by the C. L. P. Act, 1854, s. 26, "It is not necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite, and such instrument may be proved by admission or otherwise as if there had been no attesting witness." Bonds generally do not require attestation, and therefore now, in case of attestation, the attesting witness need not be called.

If the bond be thirty years old or upwards, it may be given in evidence without any proof of the execution (*p*), for it proves itself without calling the subscribing witness, even if he is alive (*q*). Some account, however, ought to be given of it, where found, &c.,

his residence or other circumstances, answers the description of him in such instrument. *Greenshields v. Crawford*, 1 D. N. S. 439.

(*k*) *Parkins v. Hawkshaw*, 2 Sta. 239; *Middleton v. Sandford*, 4 Campb. 34, *acc.*

(*l*) *Jones v. Jones*, 9 M. & W. 75.

(*m*) *Barker v. Stead*, 3 C. B. 946. The case was decided on another ground.

(*n*) *Talbot v. Hodson*, 7 Taunt. 251.

(*o*) *Fitzgerald v. Elsee*, 2 Campb. 635.

(*p*) Bull. N. P. 255. This rule extends to other paper writings, as well as deeds, *e. g.* old receipts. *Fry v. Wood*, M. 11 Geo. II. B. R. MS.; *Bertie v. Beaumont*, 2 Price, 308; and *Wynn v. Tyrwhitt*, 4 B. & Ald. 376.

(*q*) *Doe v. Burdett*, 4 A. & E. 19; *Doe v. Wolley*, 8 B. & C. 24.

in order to raise the presumption that it was regularly executed (*r*). The custody to be shown for the purpose of making a document evidence without proof of execution is not necessarily that of a person strictly entitled to the possession; it is sufficient if it is produced by persons, whose possession of it may be reasonably accounted for; although their custody be not the strictly proper one (*s*). But if there be any blemish in the bond by rasure or interlineation, the execution ought to be proved, although the bond be above thirty years old, by the subscribing witness, if living, and if he is dead, by proving his handwriting, in order to encounter the presumption arising from the rasure, &c. (*t*).

In the case of a joint bond, if one obligor only (or two out of three (*u*)) be sued, he or they must plead the matter in abatement (*x*); for advantage cannot be taken of the fact in evidence under *non est factum* (*y*), although it appear upon the declaration that there are other obligors (*z*); nor can he or they it seems demur (*a*), for the court will not intend upon demurrer that the other party or parties executed the deed unless it be so averred; *Cabell v. Vaughan*, 1 Wms. Saund. 291, n. (1), in which latter case it would seem a demurrer would lie, if it also appeared on the declaration that the other parties were alive. But where it appears on the record, the objection may be taken in arrest of judgment (*b*).

2. Accord and Satisfaction.

It appears from an *obiter dictum* in one case (*c*), that to debt on bond accord and satisfaction *before the day of payment* is a discharge. This however is not so, for it is clear that a bond cannot generally be discharged except by matter of as high a nature. Thus, if the debt arises upon an obligation without a condition, satisfaction by deed only can be pleaded (*d*). So one bond cannot be pleaded in satisfaction of another (*e*). So accord and payment of part before the day, with a promise to pay the residue at a future day, which promise the obligee accepted in satisfaction of the debt, is not a good plea; because the promise to pay is executory (*f*), but the debt is certain, and, taking its essence and operation solely by the specialty, must be avoided by matter of as high a nature (*g*).

(*r*) *Governor of Chelsea Water-works v. Cowper*, 1 Esp. 275; *Forbes v. Wale*, 1 W. Bl. 532.

(*s*) *Doe v. Samples*, 8 A. & E. 151; *Croughton v. Blake*, 12 M. & W. 208.

(*t*) *Chettle v. Pound*, Bull. N. P. 255.

(*u*) *South v. Tanner*, 2 Taunt. 254.

(*x*) *Watts v. Goodman*, Ld. Raym. 1460.

(*y*) *Whelpdale's case*, 5 Rep. 119, a.

(*z*) *South v. Tanner*, 2 Taunt. 254.

(*a*) *Gilbert v. Bath*, Str. 503.

(*b*) *Horner v. Moor*, cited 5 Burr.

2614. The jury, in this case, found it was the deed of *both*, and it appeared on the declaration that both were living. If one were dead, but that fact were omitted in the declaration, it might now be suggested under sect. 143 of the Com. Law Proc. Act, 1852.

(*c*) *Anon.*, Cro. Eliz. 46.

(*d*) *Neale v. Sheffield*, Cro. Car. 254.

(*e*) *Manhood v. Crick*, Cro. Eliz. 716.

(*f*) *Balston v. Baxter*, Cro. Eliz. 304.

(*g*) *Blake's case*, 6 Rep. 43 b.

But if the debt arises by the performance or breach of *the condition*, and not by virtue of the bond, accord and satisfaction is a good plea in discharge of the condition, and must be so pleaded (*h*), for "though the bond is under seal, *the condition* is of a thing resting in evidence only, and may be compared to a matter *in pais*" (*i*). Thus payment *and* acceptance (*k*) of a less sum *before* the day, or at a *different* place, in satisfaction, may be pleaded in bar to the sum due by the condition; for parcel of the debt, before the day, or at a different place, may be more beneficial to the obligee than the whole, at the day; and so of the gift of a horse, hawk, or robe, for the value of the satisfaction is not material (*l*); it must however have some value at law; hence, a release of an equity of redemption is not sufficient (*m*). And note the distinction between covenant, and bond with a condition, in this respect, for in the case of a covenant the whole matter is under the seal of the party, and accord and satisfaction is no answer to an action *before* breach, see *ante*, "*covenant*;" but in a bond with a condition it is not so.

3. Duress.

To debt on bond the defendant may plead, that it was obtained by duress of imprisonment. This plea admits the deed, and the proof of the issue lies on the defendant. If the defendant can prove that he was compelled to execute the bond, when he was under an arrest, without legal process, or by the process, or warrant of a person not having legal authority, it is sufficient (*n*). So if the arrest was by warrant from a justice of the peace, on a charge of felony, where there had not been any felony committed (*o*); or if the defendant, having been arrested under legal process, was forced by tortious usage in prison (*p*), it will be a duress.

The duress must be of the *person* of the *defendant* or *his wife* (*q*). In 1 Roll. Abr. 687, pl. 3, it is said, that if a person executes a deed by duress of his goods, he may avoid the deed; and 20 Ass. pl. 14, is cited, where a release made by an abbot, by duress of his cattle, was held void. But in *Sumner v. Feryman*, cited 2 Str. 917, it is said to have been held that a bond could not be avoided by duress of goods (*r*).

(*h*) *Neale v. Sheffield*, Yelv. 192.

(*i*) *Per Tindal, C. J., West v. Blake-way*, 2 M. & G. 751.

(*k*) *Drake v. Mitchell*, 3 East, 252.

(*l*) *Pinnel's case*, 5 Rep. 117, a.

(*m*) *Preston v. Christmas*, 2 Wils. 86.

(*n*) Com. Dig. Plead. (2 W. 19.)

(*o*) *Aleyn*, 92.

(*p*) 2 Inst. 482.

(*q*) Bro. Abr. Duress, pl. 18.

(*r*) *Acc. Bro. Abr. Duress*, pl. 16; *Skate v. Beale*, 11 A. & E. 983, which was a case of an *agreement*; but it was laid down that there was no distinction in this respect between a deed and an agreement not under seal. See, further, *ante*, p. 100.

One, who is a surety only, cannot plead that the bond was obtained by duress of the principal where the bond is joint and several (s), "for none shall avoid his own bond for the imprisonment or danger of any other than of himself only" (t).

4. *Illegal Consideration.*

Immoral.—A bond may be avoided, if it has been made upon an immoral consideration; as where the condition of the bond was, that the obligee and obligor should live together in a state of fornication (u). But a bond given by a single (x) or a married man (y), in consideration of *past* cohabitation with an unmarried woman, is good; because it shall be intended as a compensation for the wrong done (z).

In Restraint of Trade (a).—With respect to bonds made in restraint of trade, it may be observed, that total restraints of trade, which the law so much favours, are absolutely bad, and that all restraints, though only partial, if nothing more appear, are presumed to be bad (b); but wherever a sufficient consideration appears (c), either in the instrument, or (*semble*) by averment (d), to make it a proper and useful contract, and such as cannot be set aside without injury to a fair contractor, it ought to be maintained, provided the restraint is limited to a particular place; but if the restraint is general, that is, not to exercise a trade throughout the kingdom, the bond is void.

In debt upon bond, the condition recited, that the defendant had assigned to the plaintiff a lease of a messuage and bakehouse in L. Street, in the parish of St. Andrew, Holborn, for the term of five years; and provided, that the defendant should not exercise the trade of a baker within that parish, during the same term; or, in case he did, should within three days after proof thereof, pay to the plaintiff the sum of 50*l.* On demurrer the court adjudged the bond to be good, on the ground, that from the particular circumstances and consideration set forth, the contract appeared to be lawful and useful, and that the restraint was a particular restraint, founded on a valuable consideration (e). See also *Chesman v. Nainby*, 2 Str. 739; in which case the Courts of C. P., K. B., and House of Lords, successively recognised the same principle, *viz.*, that contracts entered into between two persons, to restrain one of

(s) 1 Roll. Abr. 687, pl. 6.

(t) *Huscombe v. Standing*, Cro. Jac. 187.

(u) *Walker v. Perkins*, 3 Burr. 1568.

(x) *Turner v. Vaughan*, 2 Wils. 339.

(y) *Nye v. Moseley*, 6 B. & C. 133.

(z) *Hall v. Palmer*, 3 Hare, 532; *Batty v. Chester*, 5 Beav. 103; *Binnington v. Wallis*, 4 B. & Ald. 650.

(a) See p. 69, *ante*.

(b) *Mallan v. May*, 11 M. & W. 665.

(c) The court will not enter into the question whether the consideration given is equal in value to the restraint agreed to. *Hitchcock v. Coker*, 6 A. & E. 438.

(d) *Mallan v. May*, 11 M. & W. 665.

(e) *Mitchel v. Reynolds*, 1 P. Wms. 181.

them from setting up or exercising a particular trade or employment *within a certain limited district*, and for a valuable consideration, were valid in law.

Where the restraint of a party from carrying on a trade is larger than the protection of the party, with whom the contract is made, can possibly require, such restraint must be considered as unreasonable in law, and the contract which would enforce it must therefore be void (*f*): as where the stipulation entered into by the defendant was not to practise as a dentist in any place where the plaintiff *might have been practising* before the expiration of his, the defendant's, service with the plaintiff (*g*). So a covenant not to carry on the trade of a brewer "in Sheffield or elsewhere" has been held to be void (*h*).

A restriction general as to *space*, though limited as to *time*, falls within this rule, and is illegal (*i*), but a restraint prohibiting a party from carrying on trade within certain limits of *space*, though unlimited as to *time*, may be good; and the limit of the space is that which, according to the trade he carries on, is necessary for the protection of the party by whom the contract is made (*k*). In *Chesman v. Nainby*, the distance within which the obligor agreed not to exercise the same trade (of a linendraper) with the obligee, was half a mile only. In *Davis v. Mason*, 5 T. R. 118, where the defendant had bound himself not to practise as a surgeon within ten miles of the plaintiff's residence, the court did not think the limits unreasonable. So in *Mallan v. May*, where the trade was that of a dentist, the limits of London were held not too large. So in the case of a tally-man, where the limits were the city of Westminster and the bills of mortality (*l*). So twenty miles round a place in the case of a surgeon (*m*); five miles in the case of a cow-keeper, &c. (*n*); or butcher (*o*). In the case of an attorney, London and 150 miles round was held not too large (*p*); and a covenant not to carry on the "canvassing" book trade within 150 miles of the General Post-office, or in Dublin or Edinburgh, or within fifty miles of either, or in any town in Great Britain or Ireland where the plaintiff might then have, or have had within the six months preceding, an establishment, was held legal (*q*). So not within 200 miles of Birmingham, in the case of a horse-hair manufacturer, *Harms v. Parson*, 32 Beav. 328, in which case it was

(*f*) *Hitchcock v. Coker*, 6 A. & E. 454.

(*g*) *Mallan v. May*, 11 M. & W. 653.

(*h*) *Hinde v. Gray*, 1 M. & G. 195.

Such a contract, however, is divisible; for part of it is illegal only in the sense of being void, and not in the sense of tainting the rest of the consideration. *Price v. Green*, 6 M. & W. 346.

(*i*) But in *Whittaker v. Howe*, 3 Beav. 383, an agreement not to practise as a

solicitor in any part of Great Britain for twenty years was enforced in equity.

(*k*) *Ward v. Bryne*, 5 M. & W. 548.

(*l*) *Colmer v. Clark*, 7 Mod. 8vo. ed. 230.

(*m*) *Hayward v. Young*, 2 Chitty, 407.

(*n*) *Proctor v. Sargent*, 2 M. & G. 20.

(*o*) *Elves v. Crofts*, 10 C. B. 241.

(*p*) *Bunn v. Grey*, 4 East, 190.

(*q*) *Tallis v. Tallis*, 1 E. & B. 391.

said that the limit of exclusion depends upon the character of the business, and it will not be considered unreasonable if it was necessary for the protection of the purchaser. But a district 200 miles in diameter was held an unreasonable restriction in the case of a dentist (*r*). So, within 600 miles of London, in the case of a perfumer (*s*).

So a restraint unlimited in point of *time*, but limited as to certain *persons*, is good: as where the condition of a bond was not to trade with the persons named in the schedule thereto (*t*). So an agreement not to supply bread, &c., to the customers "then dealing at the premises" of the plaintiff (*u*). So a covenant not to be concerned as attorney for any person who had already been, "or should from time to time *thereafter* be," clients of the plaintiff (*x*); not to carry on the business of a ropemaker, except on government contracts (*y*).

A covenant not to carry on a trade, except as an assistant to the plaintiff in that trade, is good (*z*). A condition not to practise a trade at S., or within ten miles thereof, at any time, without the written consent of K. W., is not confined to the lifetime of K. W. (*a*). In *Hilton v. Eckersley*, 6 E. & B. 47, the condition of the bond recited that the obligors, mill-owners, had, in consequence of societies and combinations among their workpeople and others, whereby persons, otherwise willing to work, were deterred from so doing, and the legal control of the obligors' property was injuriously interfered with, agreed to carry on their works, with regard to the amount of wages, the periods of engagement of workpeople, the hours of work, the suspension of their works, and the general discipline and management thereof, in accordance with the resolutions of a majority of the obligors present at any meeting to be convened; on the performance of which condition, the bond was to be void, otherwise to be in full force and effect. It was held, in the Exch. Ch., that the bond was void, as restraining each obligor's power of carrying on his trade according to his discretion, and for his own best advantage. So, too, in the case of trades unions, their rules are illegal, in the sense that they cannot be enforced in a court of law (*b*).

Other Instances.—It is impossible to enumerate every species of illegality, for which a bond may be avoided: but before I close this

(*r*) *Horner v. Graves*, 7 Bingh. 735.

(*s*) *Price v. Green*, 16 M. & W. 346. The true principle of admeasurement in these cases is to take the nearest mode of access; *Leigh v. Hind*, 9 B. & C. 774; and the populousness or otherwise of the district is immaterial. *Mallan v. May*.

(*t*) *Hunlocke v. Blacklaw*, 2 Wms.

Saund. 155, b.

(*u*) *Rannie v. Irvine*, 7 M. & G. 969.

(*x*) *Nicholls v. Stretton*, 10 Q. B. 346.

(*y*) *Gale v. Reed*, 8 East, 78.

(*z*) *Wallis v. Day*, 2 M. & W. 273.

(*a*) *Hastings v. Whitley*, 2 Exch. 611.

(*b*) *Hornby v. Close*, 2 L. R. Q. B. 153.

head, I cannot forbear to mention the case of *Collins v. Blantern*, 2 Wils. 347, which underwent a long and serious discussion. It was an action of debt on bond, in which the defendant was jointly and severally bound with A. and B. in the penal sum of 700*l.*, conditioned for the payment by A. and B. and the defendant, of the sum of 350*l.* The defendant pleaded that A. and B., and three other persons, stood indicted by John Rudge, for wilful and corrupt perjury, and were to be tried at the ensuing assizes in Stafford, whereupon it was unlawfully agreed, between Rudge the prosecutor, the plaintiff, and the five persons indicted, that the plaintiff should give Rudge his promissory note for 350*l.*, for not appearing to give evidence at the trial, and that the obligors should execute the bond to the plaintiff as an indemnity to the plaintiff for giving such note: concluding with an averment, that the said agreement was carried into effect, and that the bond was given for the said consideration, and no other. On demurrer, the court gave judgment for the defendant on the grounds: 1st, That it was an agreement to stifle a prosecution for perjury,—a crime most detrimental to the commonwealth: that the promissory note was certainly void, and consequently the plaintiff was not entitled to recover upon the bond which was given to indemnify him from such note: they were both bad (c), the consideration for giving them being wicked and unlawful. 2ndly, That the bond was void, because it was given for the purpose of tempting a man to transgress the law. 3rdly, That the special matter might be pleaded; although it was objected, that the law would not endure a fact *in pais de hors*, a specialty to be averred against it, and that a deed could not be defeated by anything less than a deed; for the condition in this case was, for the payment of a sum of money; but, *that* payment to be made, was grounded upon a vicious consideration, which was not inconsistent with the condition, but struck at the contract itself, in such a manner as showed that the bond never had any legal entity; and if it never had any being at all, then the maxim, that a deed must be defeated by a deed of equal strength, did not apply to this case. The averment pleaded in this case was not contradictory to, but explanatory of, the condition.

The true meaning of the above rule, that matters *dehors* the deed cannot be pleaded, is, that matter inconsistent with or contrary to the deed cannot be alleged, but matter consistent with the deed may (d). “Since the case of *Pole v. Harrobin*,” however, “it has been generally understood, that an obligor is not restrained from pleading any matter which shows that the bond was given upon an illegal consideration, whether consistent or not with the condition of the bond.” *Per* Lord *Ellenborough*, C. J. (e). “It is true, that you cannot add to a contract under seal any thing

(c) S. P. admitted *per Cur.* in *Cuthbert v. Hale*, 8 T. R. 392.

(d) *Buckler v. Miller*, 2 Vent. 107.
(e) *Paxton v. Popham*, 9 East, 421, 2.

to vary the contract; but you may show dehors the instrument, that such contract was entered into for an illegal purpose." *Per* Lord Abinger, C. B. (*f*). In debt on bond, conditioned for the payment of a sum of money in case the defendant did not procure I. S. then impressed, to appear and deliver himself to the plaintiff when called upon: the defendant pleaded that I. S. having been *unlawfully impressed*, the plaintiff was unwilling to discharge him, unless he would agree to pay a certain sum of money, and would procure the defendant to become bound; and thereupon it was unlawfully agreed, that the plaintiff should discharge I. S. on the defendant becoming bound for that sum, and therefore the bond was void. To this plea there was a demurrer, on the ground that the defendant could not aver matter inconsistent with the condition of the bond; that it appeared by the condition that the party was impressed, which meant legally *ex vi termini*. But the court held the plea to be good (*g*). So where the condition of the bond stated, that the defendants had borrowed of the plaintiffs a sum of money, which was to run at *respondentia* interest, on the security of certain goods shipped from Calcutta to Ostend. The defendants pleaded, that the bond was given to cover the price of goods knowingly sold by the plaintiffs to the defendants, for the purpose of an illegal traffic from the East Indies, without expressly negating the fact that it was borrowed, as expressed in the condition. The plea was held good, *Le Blanc, J.*, observing, that after the cases, breaking in upon the old rule, had determined, that though the bond state nothing illegal upon the face of it, the obligor may show by his plea, that it was given for an illegal consideration, they had, in effect, decided, that he may show an illegal consideration different from the consideration stated in the condition. And when the plea states, that the bond was given to cover the price of goods illegally contracted to be sold and shipped, it does in effect deny that it was given for money borrowed; and it shows that the statement in the condition was made colourably in order to cover the illegal agreement (*h*).

Gaming.—Where the consideration on which the bond is given is illegal by statute, the defendant may take advantage of it by pleading. And if the bond contain several conditions, although one of the conditions only be void by a statute, yet the whole bond is void (*i*). Thus it was held that a deed given to secure the purchase-money of land sold for an illegal object, *viz.*, that it might be sold by lottery, could not be enforced (*k*). A bond given in pursuance of an agreement that a deed of apprenticeship should be antedated, in order that the apprentice might be admitted to

(*f*) *The Gaslight Company v. Turner*,
6 B. N. C. 327.

(*g*) *Pole v. Harrobin*, 3 Doug. 91.

(*h*) *Paxton v. Popham*, 9 East, 408.

(*i*) *Norton v. Symes*, Moore, 856.

(*k*) *Fisher v. Bridges*, 3 E. & B. 642.

practise as an apothecary in two years instead of five, as required by statute, was held illegal (*l*). By 8 & 9 Vict. c. 109, s. 18, all contracts or agreements by way of gaming or wagering are rendered void.

Hazard, roulette, and certain other games, are declared to be illegal by 12 Geo. II. c. 28. s. 2 and 3, and 18 Geo. II. c. 34. See further, *ante*, p. 109.

Sale of Office.—By 5 & 6 Edw. VI. c. 16, s. 2 and 3 (*m*):—If any person take any bond to receive any money, fee, reward, or other profit, directly or indirectly, for any office or offices, or any part of them, or to the intent that any person should enjoy any office, or the deputation of any office, or any part thereof, which office, or any part, shall in any wise touch the administration or execution of justice; or the receipt, controlment, or payment of any of the king's money, revenue, &c., customs, &c.; or which shall touch any clerkship to be occupied in any manner of court of record, wherein justice is to be ministered: every such bond shall be void against the person making it. By the 4th section, offices of inheritance, or of the keeping of any park, house, &c., are excepted. See *Huggins v. Bainbridge*, Willes, 241.

There were two principal reasons for making this statute (*n*), 1st, that offices might be exercised by persons of skill and integrity; 2ndly, that they might take only the legal fees; for those who buy their offices will be apt to take more than their legal fees, according to what is said in 3 Inst. 148, "they that buy will sell." The office of registrar of an archdeaconry is an office within this statute (*o*), because it is an office concerning the administration of justice. So is, it seems, the office of under-sheriff (*p*). Where an office is within the statute, and the salary is certain, if the principal makes a deputation, reserving a lesser sum out of the salary, and take a bond conditioned for the payment of such lesser sum, such bond is not within the statute. So if the profits be uncertain, arising from fees, if the principal make a deputation, reserving a sum certain out of the fees and profits of the office, it is good: for in these cases the deputy is not to pay, unless the profits amount to so much; and though a deputy, by his constitution, is in place of his principal, yet he has not any right to the fees, which still continue to be the principal's; so that, as to him, it is only reserving a part of his own, and giving away the rest to another; but where the reservation or agreement is not to pay out of the profits, but to pay generally a certain sum, which must be

(*l*) *Prole v. Wiggins*, 3 B. N. C. 240.

(*m*) As to what offices are within the statute, see *Sterry v. Clifton*, 9 C. B. 110.

(*n*) *Per Willes, C. J., Layng v. Payne*, Willes, 573.

(*o*) *Woodward v. Foxe*, 3 Lev. 289.

(*p*) *Browning v. Halford*, Freem. 19; but the sale of such office is expressly forbidden by 3 Geo. I. c. 15, s. 10, under a penalty of 500*l*.

paid at all events, a bond conditioned for the payment of such sum is void by the statute (*q*); even although it appear on the record that the profits of the office exceed the sum agreed to be paid (*r*).

So where, by the condition of the bond, it appeared that A. had granted to B. and C. (the son of A.) the office of registrar of an archdeaconry for their lives, and the terms of the condition were, 1st, that B. should permit C. to receive *all* the profits of the office: and, 2ndly, that B. should surrender the office and profits whenever C. should require it; it was held, that this condition was within the provision of the statute, and made the bond void; first, because an agreement to have all the profits was an agreement to receive *some* profit, which was contrary to the words of the statute; secondly, because either B. must execute the office for nothing, or he must take more than his legal fees; that a person of skill, and of integrity, would not execute such an office for nothing; and if he had anything for it, it must be by extortion, and by taking illegal fees, and thereby the principal end of the statute would be eluded. As to the condition that B. should surrender the office at the request of C.; the court said that it was unnecessary to decide that, inasmuch as it had been held, that if any of the conditions are void *by statute*, the whole bond is void. They intimated, however, a clear opinion that this branch of the condition was void also; for the donor thereby reserved to himself an absolute power over his officer, which he ought not to do. Besides, if this were allowed, there would be a plain method chalked out to evade the statute; for any one by this means might sell an office for the full value. For let such a condition be put in, let the bond be given for the full value of the office, and let it be agreed between them, that the officer shall refuse to surrender upon request, and then the grantor will recover on the bond, and so have the full value of the office (*s*).

An agreement by A. to sell to B. his business as a law stationer and also to resign the office of sub-distributor of stamps and collector of assessed taxes which he then held, and to use his best endeavours to introduce B. into the said *business and offices*, was held void under the above statute (*t*).

The 5 & 6 Edw. VI. c. 16, was extended by 49 Geo. III. c. 126, to Scotland and Ireland, and to all offices in the gift of the crown, or of any office appointed by the crown, and to all commissions, civil, naval, or military, and to all offices, &c., under the appointment of the East India Company; and the transactions prohibited by the two Acts were made misdemeanors; but by section 7, the

(*q*) *Per Cur.*, *Godolphin v. Tudor*,
Salk. 468.

(*r*) *Gargorth v. Fearon*, 1 H. Bl. 327.

(*s*) *Layng v. Payne*, Willes, 571.

(*t*) *Hopkins v. Prescott*, 4 C. B. 578.

sale of certain offices in the palace, and of commissions in the army at the regulated prices, by authorised agents, are excepted. Under the last-mentioned statute it was held, "that a bond given by a lieutenant in the E. I. Company's service to repay part of the money advanced by the senior captain to the major, in pursuance of an agreement to that effect among the officers of the regiment for the purpose of inducing the major to resign his commission, was void (*u*).

A., through his interest with the commissioners of excise, procured for B. a supervisor's place in that office, and in consideration thereof, B. gave a bond for the payment of 10*l. per ann.* to A., as long as B. should continue in the office. B. died, having for some years omitted the payment of the amount; whereupon A. brought an action on the bond against the executrix of B., who filed a bill in equity to be relieved against the bond, which was allowed (*x*); and *per Lord Talbot, C.*—It is agreed on all hands that this bond is good at law, wherefore the representative of the obligor is obliged to come hither for relief (*y*). Bonds of this nature are highly to be discouraged; merit, industry, and fidelity ought to recommend persons to these places, and not interest with the commissioners, who, it is to be presumed, had they known from what motive the plaintiff at law applied to them on behalf of his brother, would have rejected him. The officer's giving money to a friend of the commissioners, for his interest, is altogether as bad as giving money, or a bond for money, to the commissioners themselves, which undoubtedly would have been relieved against. It is a fraud on the public, and would open a door for the sale of offices relating to the revenue. The taking away from the officer, what the commissioners and the treasury think to be but a reasonable reward for his care and trouble, and an encouragement to his fidelity, must needs be of the most pernicious consequence, and induce him to make it up by some unlawful means, such as corruption and extortion; and though the excise was no part of the revenue at the time of making the 5 & 6 Edw. VI., yet there may be good ground to construe it within the reason and mischief of the law, which is rather remedial than penal (*z*).

(*u*) *Graeme v. Wroughton*, 11 Exch. 146. See *R. v. Charretie*, 18 L. J., M. C. 100.

(*x*) *Law v. Law*, 3 P. Wms. 391.

(*y*) *S. C. Ca. Temp. Talb.* 140.

(*z*) And see *Hannington v. Du Chastel*, 1 Bro. C. C. 124. It is no new thing, but usual, that an interest raised by a subsequent statute, should be under the same remedy and advantage as an interest existing before. Thus, at common law, no acceptance of a collateral recompense could bar a wife of her dower; but the 27 Hen. VIII. c. 10, made a jointure

to be a bar, which at that time extended only to a jointure made by act executed in the husband's life-time. Afterwards the 32 Hen. VIII. c. 1, enabled a man to devise his lands; when it was held, that if a man were to devise lands to his wife in satisfaction of her dower, and she should accept them, this would be a bar within 27 Hen. VIII. (4 Rep. 4, a, b,) because it is within the same equity and reason, and the diversity is in the manner only, not in the thing. See *Lane v. Cotton*, Salk. 17.

Simony.—Simony is the corrupt presentation of a person to an ecclesiastical benefice for money, &c. Every contract made for or about any matter or thing, which is prohibited and made unlawful by any statute, is a void contract, although the statute itself doth not mention that it shall be so, but only inflicts a penalty on the offender; because a penalty implies a prohibition, though there are not any prohibitory words in the statute. Hence, in the case of simony, although the 31 Eliz. c. 6, only inflicts a penalty by way of forfeiture, and does not mention any avoiding of the simoniacal contract, yet it has been always held, that such contracts, being against law, are void (a).

By 31 Eliz. c. 6, s. 5:—If any person or persons (b), or bodies corporate, shall, *for money*, reward, gift, profit, or *benefit, directly or indirectly*, or for or by reason of *any promise*, agreement, grant, bond, covenant, or other assurance of or for any money, &c., directly or indirectly, present or collate any person to any benefice with cure of souls, dignity, prebend, or living ecclesiastical, or bestow the same for any such corrupt consideration, every such presentation, &c., and every admission, institution, investiture, and induction thereupon shall be *void* (c), and it shall be lawful for the crown to present, &c., to such benefice, &c., for that one turn only; and every person, &c., that shall give or take such money, &c., or take or make any such promise, &c., or other assurance, shall forfeit double the value of one year's profit of such benefice, &c. (d), and the person so corruptly taking, &c., such benefice, &c., shall thenceforth be adjudged disabled to enjoy the same (e).

By sect. 6:—If any person shall for money, &c. (other than for lawful fees), or for any promise, &c., or other assurance for money, &c., directly or indirectly admit, institute, instal, induct, invest, or place any person in any benefice with cure of souls, dignity, prebend, or other living ecclesiastical, every such offender shall forfeit double the value of one year's profit of such benefice, &c., and the same benefice, &c., shall be void, and the patron, &c., shall present or collate unto the same, as if the party so admitted, &c., were dead.—The 7th section provides, that no title to confer or present by lapse, shall accrue upon any avoidance mentioned in the Act, but after six months next after notice given of such avoidance, by the ordinary to the patron. By the 8th section:—If any incumbent of any benefice, with cure of souls, shall *corruptly* resign or

(a) *Per Holt, C. J., in Bartlett v. Vinor*, Carth. 252.

(b) Usurpers, as well as persons having title to present or collate, are within this statute; 1 Inst. 120, a; but if the corrupt presentation or collation is by an usurper, then the king shall not present, but the right patron. 3 Inst. 153, 154.

(c) So as to be defence in a suit by the simoniacal parson for tithes. Hob. 168.

Secus, in an action for rent; *Cooke v. Loxley*, 5 T. R. 4.; or where the occupier of the land has entered into an agreement for the composition of tithes. *Brooksby v. Watts*, 6 Taunt. 333.

(d) *i. e.*, the actual value as found by the jury. 3 Inst. 154.

(e) Where the presentee is not privy to the corrupt contract, he shall not be adjudged a disabled person. 3 Inst. 154.

exchange the same, or corruptly take, for the resigning or exchanging the same, directly or indirectly, any pension, money, or benefit, as well the giver as the taker thereof shall lose double the value of the sum so given, the one moiety as well thereof as of the forfeiture of double value of one year's profit to be to the crown; and the other to him that will sue for the same, by action of debt, &c., in any court of record.

In this eighth section, Lord *Mansfield*, C. J., thought that the word "corrupt" was an emphatic word, and that if the presentation was pure, the resignation was not corrupt; but the rest of the court were of a different opinion, and thought every resignation for money was corrupt; and upon this construction they held, that a bond, given to an incumbent, securing to him an annuity of equal value with the profits of the benefice upon his resignation, in order that another person might be presented, who might give a general bond of resignation, so that the patron's son, when of proper age, might be presented, was void (*f*).

By the 12 Ann. stat. 2, c. 12, s. 2:—If any *person* shall, for money or profit, or for any promise, agreement, &c., or other assurance for money, &c., directly or indirectly, in his own name, or in the name of any other person, procure the next presentation to any living, &c., and shall be presented or collated thereupon, every such presentation and admission, &c., shall be void, and such agreement shall be deemed a simoniacal contract: and it shall be lawful for the crown to present for that turn only; and the person so corruptly accepting such living shall thenceforth be disabled to enjoy the same.

The statutes against simony apply only to the presentation corruptly procured or intended to be procured. The presentation thus procured or trafficked for is forfeited to the crown, and certain penalties and disabilities are inflicted on the offenders; the statutes contain no express provision for avoiding simoniacal conveyances; but there can be no doubt that the conveyance even of an advowson in fee,—which in itself is legal,—if it be made for the purpose of carrying a simoniacal contract into execution, is void as to so much as goes to effect that purpose; and, if the sound part cannot be separated from the corrupt, is void altogether. But if the sound can be fairly separated from the objectionable part, it will be good; although by the contract one entire consideration was paid for the whole advowson (*g*). An agreement for the sale of an advowson containing a stipulation that the vendor should pay interest until the benefice became vacant, the incumbent being a son of the vendor but not a party to the contract, was held not to be simoniacal (*h*).

(*f*) *Yonge v. Jones*, 3 Doug. 97. This decision was in 1782, at which time general bonds of resignation were held to be good.

(*g*) *Greenwood v. Bishop of London*, 5 Taunt. 746.

(*h*) *Sweet v. Mccredith*, 3 Giff. 610; 31 L. J. Ch. 817.

If a perpetual advowson be sold, when the church is void, the next presentation will not pass; and if the next avoidance only be sold after the death of the incumbent, the sale is altogether void (*i*). But the purchase of an advowson in fee, where no privity of the clerk intended to be presented appears, has been held not to be simoniacal; although the incumbent was *in extremis* at the time when the purchase was made (*k*). So the purchase of a next presentation, although the incumbent was *in extremis* within the knowledge of both contracting parties, but without the privity of, or a view to, the nomination of the particular clerk, who was afterwards presented, is not void on the ground of simony (*l*). The sale of the advowson of a church which is full is not simoniacal by reason of the incumbency being at the time of sale *voidable* at the election of the patron: but a conveyance under such sale will not pass the right of immediate presentation (*m*).

An agreement entered into by a curate, as the consideration for his taking the curacy, acknowledging the amount of a less sum as immemorially due to the curate than really was due, with the object of estopping him from insisting on his right as curate to the small tithes, is simoniacal, as affording a benefit to the party presenting (*n*).

If the patron takes of the clerk a bond, conditioned for the performance of a legal act, *e.g.*, to pay a sum of money to the son of the last incumbent for a certain time (*o*); to resign when the patron's nephew attains his full age (*p*); to resign on three months' notice to be given by the patron, in order that the patron's son may be presented, and to keep the buildings in repair (*q*); to reside on the living, or to resign in case of not returning after notice, and also not to commit waste on the parsonage-house (*r*); it has been held, that such bonds are good, and that they cannot be avoided on the ground of simony.

Resignation Bonds.—With respect to general resignation bonds or bonds by a clergyman, conditioned to resign at the request of the patron, without expressing the object for which such resignation was intended, the history of the law is very curious. A long train of decisions, commencing with *Johnes v. Lawrence* (*s*), had established that such bonds were legal. Bishop Stillingfleet, however, had, in 1698, written an elaborate discourse against these

(*i*) *Per Cur.*, 6 Bingham. 17.

(*k*) *Barrett v. Glubb*, 2 W. Bl. 1052.

(*l*) *Fox v. Bishop of Chester*, 6 Bingham.

1.

(*m*) *Alston v. Atley*, 7 A. & E. 289.

(*n*) *R. v. Bishop of Oxford*, 7 East, 600.

(*o*) *Baker v. Mounford*, Noy, 142.

(*p*) *Per Lord Macclesfield*, in *Peele v.*

Capel, Str. 534.

(*q*) *Partridge v. Whiston*, 4 T. R. 359.

(*r*) *Bagshaw v. Bossley*, 4 T. R. 78.

(*s*) Cro. Jac. 248—274. See *Babington v. Wood*, Cro. Car. 180; *Watson v. Baker*, T. Raym. 175; *Peele v. Com. Carlisle*, Str. 227; *Windham v. Boyer*, T. 27 Geo. II.; *Hesketh v. Gray*, Sayer, 185; Amb. 268.

decisions ; and, when the case of *Ffytche v. The Bishop of London* occurred, Mr. J. Buller declared, that he had searched with little effect to find out on what principle those decisions were founded ; and that, after all the labour he had bestowed upon the subject, it did seem to him that they were destitute of all sense, reason, or principle. But still they were so numerous,—they had arisen at so many different periods, all the judges for near two centuries past had been so uniformly of the same opinion,—the law had been received not only in Westminster Hall, but through the whole kingdom as so firmly settled, and mankind had so universally acted upon that idea,—that he thought it would be very dangerous to overturn or even to shake it. Whilst, however, the courts of common law upheld these bonds, the courts of equity took care that an improper use should not be made of them ; and whenever the patron put such bond in suit for an illegal purpose, *e.g.* to discharge himself from a claim of tithe or the like, injunctions were granted to stay proceedings in the actions (*t*). The validity of a general resignation bond by a clergyman was agitated for the last time in *Ffytche v. The Bishop of London* ; and, although the Court of C. P. and K. B. (*u*), as the case came respectively before them, considered themselves as bound by the authorities, and decided in favour of the bond, yet upon a writ of error being brought in parliament, their judgment was reversed (although all the judges, except *Eyre*, C. B., had declared their opinion in favour of the bond), upon the motion of Lord Thurlow, Ch., by a division of nineteen against eighteen peers.

The ground of this decision appears to have been, that such a bond was simoniacal and against the 31 Eliz. c. 6, and not that it was contrary to the general principles of the common law (*x*). Hence, notwithstanding this decision, the judges afterwards, in cases to which the statute against simony did not apply, considered themselves as bound by prior authorities (*y*). Therefore it was held, that a bond given by a schoolmaster of an ancient public school, to resign at the request of his patron, was good (*z*). *Lawrence*, J., however, entertained considerable doubts upon this question, influenced, as it appears, by the arguments which had prevailed against the validity of general resignation bonds by clergymen. After the case of *The Bishop of London v. Ffytche*, special bonds of resignation, *i. e.*, bonds of resignation in favour of a particular person, or of one or two specified persons, were for some time considered as not illegal (*a*) ; this point, however, came under the review of the House of Lords, in *Fletcher v. Lord*

(*t*) *Durston v. Sandys*, 1 Vern. 411.
Hilliard v. Stapleton, 1 Eq. Ca. Abr. 86.

(*u*) 1 East, 487.

(*x*) See Cunningham's Law of Simony, in which the proceedings in the House of Lords are reported very fully and accu-

ately. 1 East, 487, n. a.

(*y*) See *Bagshaw v. Bossley*, 4 T. R. 78.

(*z*) *Legh v. Lewis*, 1 East, 391.

(*a*) See the opinion of *Dampier*, J., in *Newman v. Newman*, 4 M. & S. 71.

Sondes (b). In that case Fletcher had given a bond to the patron of the living, Lord Sondes, from the condition of which it appeared that the obligee, Lord Sondes, was the patron of the rectory of Kettering, which rectory was then vacant by the death of the incumbent; that Lord Sondes had presented Fletcher, the obligor, to supply the vacancy, and that Fletcher had agreed to resign upon request, *for the sole purpose that the owner of the advowson might be enabled to present thereto either H. W. or R. W.*, when the party to be presented should be capable of taking the same. On the case being brought before the House of Lords, nine of the judges delivered their opinion, three in favour of the bond, and six against it. The case was adjourned; and on the 9th of April, 1827, Lord Eldon, Ch., delivered the decision of the House, that the bond in question was void; he being of opinion that the decision in *The Bishop of London v. Ffytche* governed the case.

In consequence of the above decision, the 7 & 8 Geo. IV. c. 25, was passed, by which it was enacted, that no presentation to any spiritual office made before the 9th of April, 1827, should be void, on account of any agreement to resign, when some person, or one or two persons, specially named, should become qualified to take the office, and that the parties to the agreement should not be subject to any penalties on account of the agreement; and that engagements made before the 9th of April, 1827, for the resignation of any benefice, &c., in favour of some person, or one or two persons so specially named, should be valid, &c. The above Act was *retrospective* merely, but in the following year the 9 Geo. IV. c. 94, was passed, for rendering valid bonds, covenants, and other assurances for the resignation of ecclesiastical preferments, in *certain* specified cases; the material provisions of which are:—

1st. The engagement must be *bond fide*. 2nd. The purpose must be manifested in the terms of the engagement. 3rd. The engagement must be entered into before the appointment to the benefice. 4th. The resignation must be in favour of any one person named and described, or if two persons are named and described, each of them shall be, either by blood or marriage, an uncle, son, grandson, brother, nephew, or grand-nephew of the patron, or one of the patrons (not merely a trustee), or of one of the persons for whom the patron is trustee, or of the person by whose appointment the presentation is made, or of any married woman, whose husband in her right shall be patron, or one of the patrons, or of any other person, in whose right the presentation is made. 5th. The instrument, by which the engagement is entered into, must be deposited within two calendar months after its date in the office of the registrar of the diocese, wherein the benefice is locally situate; and shall be open to inspection, and an office-copy thereof shall be admitted in evidence. 6th. The resignation must

refer to the engagement in pursuance of which it is made, and must state the name of the person for whose benefit it is made. 7th. Such person must be presented within six calendar months after notice of the resignation.

The statute, however, is confined to such persons only as are entitled to the patronage of the spiritual office as private property; and does not extend to cases where the presentation, &c., is made by the King in right of the crown, or the Duchy of Lancaster, or by any ecclesiastical person, body corporate, or other person in right of any office or dignity, or by any company, or trustees for charitable or other public purposes.

5. Infancy.

An infant may bind himself by a single bill (c) to pay for necessities; but if he enters into an obligation with a penalty, such obligation may be avoided by a plea of infancy (d). Whether such an obligation be void or voidable appears to have been a *voxata quæstio* (e). That the contracts of infants generally are *voidable* only, and not *void*, is clear (f); but it seems they cannot be ratified after the infant comes of age, except by an instrument of as high a nature as that which created the original obligation (g).

Infancy cannot be given in evidence under the general issue (h). Upon the principle which exempts an infant from a penalty, it has been held, that a person may recover, in an action for money had and received, a sum which, while an infant, he had paid in advance towards the purchase of a share in the defendant's trade, which sum was to be retained by the defendant as a forfeiture, if the plaintiff failed to fulfil an agreement to enter into partnership with the defendant (i). An infant cannot give a security for interest; consequently to a bond with a penalty, conditioned for payment of interest as well as principal, infancy may be pleaded in bar (k).

(c) *Russell v. Lee*, 1 Lev. 86; see *ante*, 152, n. (e).

(d) *Ayliffe v. Archdale*, Cro. Eliz. 920.

(e) See *Morning v. Knopp*, Cro. Eliz. 700. Authorities tending to show that it is void are, Noy's Rep. 85; *Delavel v. Clare*, Com. Dig. Infant (C. 2); Bull N. P. 132. "If an infant become indebted for necessities, and give a bond in a penalty for the money, it will not extinguish the simple contract debt; for the bond is void." The case of *Ayliffe v. Archdale*, however, which is quoted by Mr. J. Buller as the authority for the

above position, does not fully bear it out. Authorities tending to prove that such obligation is voidable only, are *Edmund's case*, cited 1 Leon. 114; 2 Roll. Abr. 146, (A.) 4; Litt. s. 259; Perk. s. 12; 1 Bl. Com. 466; *Tapper v. Davenant*, 3 Keb. 798; Salk. 279, *per Treby*, C. J.

(f) *Ante*, "Assumpsit;" *Infancy*, p. 152.

(g) *Baylis v. Dineley*, 3 M. & S. 477.

(h) *Whelpdale's case*, 2nd Res. 5 Rep. 119, a, and 8 pl. R. H. T. 1853.

(i) *Corpe v. Overton*, 10 Bingh. 252.

(k) *Fisher v. Mowbray*, 8 East, 330.

6. *Payment*, p. 512.*Solvit ad Diem*, p. 512.*Solvit post Diem*, p. 513.

Payment.—At the common law, it was a general rule, that where an action was grounded on a deed, the defendant could avoid it by matter of as high a nature only, as by an acquittance under seal. Hence to debt on a single bill, payment merely without an acquittance could not *properly* be pleaded (*l*) ; although, if it were, and issue joined thereon, and found for the plaintiff, it was held to be aided by the statutes of jeofails (*m*). But now, by 4 Ann. c. 16, s. 12, where debt is brought on any single bill, payment of the money due thereon may be pleaded in bar. To debt on bond, *with a condition* for the payment of money on a day certain, the defendant might, even at common law, have pleaded payment at the day (*n*) ; because such plea was in effect a plea of performance of the condition merely.

Solvit ad Diem.—A plea of payment, from the language of the plea when the pleadings were drawn in Latin, has obtained the name of a plea of *solvit ad diem*. This is the proper form of plea, as well where the money has been paid *before* the day, as where it has been paid *at* the day. Indeed, in the case of a bond conditioned for payment *at* a day certain, if the money has been paid *before* the day, *solvit ad diem* is the only proper plea (*o*) ; for if the defendant, agreeably to the fact, should plead payment *before* the day, and issue should be joined thereon, and a verdict found for the plaintiff, and judgment accordingly, such judgment might be reversed on error ; because there would still remain a possibility that the money was paid *at* the day, in which case the plaintiff would not have had any cause of action. Hence, in the case of payment *before* the day, the defendant must plead a payment *at* the day ; and then, if issue is joined thereon, proof of payment before the day will be sufficient to support the defendant's plea (*p*). Not that, in the case of a bond conditioned for payment at a certain day, there can properly be any legal performance of the condition but by payment *at* the day, but payment before the day may be given in evidence on *solvit ad diem*, and for this reason, that the money is considered as a deposit in the hands of the obligee until the day arrives, and then it is actual payment (*q*).

Where, however, a bond is conditioned for the payment of money *on or before* such a day, the defendant may plead payment before the day, if the fact be so ; and the plaintiff cannot demur to

(*l*) Doct. Plac. 107.(*m*) *Nichol's case*, 5 Rep. 43, a.(*n*) Doct. Plac. 107.(*o*) *Holms v. Broket*, Cro. Jac. 434 ;*Merril v. Josselyn*, 10 Mod. 147.(*p*) *Bond v. Richardson*, Cro. Eliz. 142.(*q*) *Tryon v. Carter*, 7 Mod. 231.

such plea, as tendering an immaterial issue; but, if no payment has in fact been made, ought to reply, "that the money was not paid at the day mentioned in the plea, nor at any time before or after that day" (see 2 Wms. Saund. 48 a, note (h)), which will bring the point to the material and proper issue, whether it has ever been paid at all or not (r). But if to a bond so conditioned the defendant pleads payment *on* the day, and issue is joined thereon, and verdict for the plaintiff, a repleader must be awarded, as being an immaterial issue; for such verdict does not find any breach of the condition, because the money might have been paid before the day which would have been a performance of the condition (s).

Solvit post Diem.—The bond being forfeited by the non-payment of the money on the day mentioned in the condition, a payment *after* the day could not be pleaded at the common law; but by 4 Ann. c. 16, s. 12,—“Where an action of debt is brought upon any bond which hath a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, if the obligor, his heirs, executors, or administrators, have, *before the action brought*, paid to the obligee, his executors or administrators, the principal and interest due by the defeasance or condition of such bond, though such payment was not made strictly according to the condition or defeasance, yet it shall and may nevertheless be pleaded in bar of such action, and shall be as effectual a bar thereof as if the money had been paid at the day and place according to the condition or defeasance, and had been so pleaded.”—The meaning of this section is, that *any* payment, which, if made at the very day, would be pleadable as a defence at common law, may, if made after the day and before action, be pleaded under the statute (t). If the bond, therefore, is for the payment of a sum of money on a certain day and interest in the meantime, there being no clause that on failure of payment of interest the principal shall become due, the defendant may before that time plead *solvit post diem* to the interest alone (u). *Secus*, if by the non-payment of interest the whole principal becomes due (x). The form of plea under the statute is, *that the defendant, after the day mentioned in the condition, and before the commencement of the suit, paid the money mentioned in the condition, with interest*.

A bond for the payment of money by instalments is (*semble*) within the above-section (y). So are, it seems, annuity (z) and *post obit* bonds (a), and bonds payable generally on a contin-

(r) *Fletcher v. Hennington*, 2 Burr. 944.

(s) *Tryon v. Carter*, Str. 994.

(t) *Per Patteson, J., Hodgkinson v. Wyatt*, 1 D. & L. 668.

(u) *Hodgkinson v. Wyatt*, *supra*.

(x) *Marriage v. Marriage*, 1 C. B. 761.

(y) *Bonafous v. Bybot*, 3 Burr. 1370.

(z) *Willie v. Wilks*, Dougl. 520.

(a) *Murray v. Earl of Stair*, 2 B. & C. 82.

gency, on the happening thereof (b). The section is confined to *payments* only; hence a *tender* and refusal of principal and interest *after* the day, and before action brought, cannot be pleaded (c). It was held on special demurrer that payment of part cannot be pleaded as to so much (d), but on the other hand such a plea has been held good after verdict (e). Where the obligee of a bond receives the whole principal after it is payable, he cannot recover interest in an action on the bond, as *solvit post diem* is a good plea (f).

Formerly, if a bond had lain dormant for twenty years or more, without payment of interest or other circumstance to account for the acquiescence, this was evidence sufficient, whence a jury might have presumed payment; now, by 3 & 4 Will. IV. c. 42, s. 3, all actions of debt, upon any bond or other specialty, shall be commenced within twenty years after the cause of such action or suit. In the case of a *post obit* bond, this is the death of the party on whose decease the sum secured is payable (g). Where a bond is conditioned for the performance of a series of acts at stated times, though there may have been a forfeiture by reason of the non-performance of the first act in that series, yet, if default be made in the performance of subsequent acts, a new cause of action arises upon each default, and the statute runs from that (h).

In any action upon a bond which has a condition or defeasance to make void the same upon payment of a lesser sum at a day or place certain, with a penalty, money may, by leave of a court or a judge, be now paid into court, and such payment into court be pleaded under Common Law Procedure Act, 1860, s. 25.

7. Release.

To debt upon bond, the defendant may plead a release, by the plaintiff, after the bond given; and if the release has been obtained by fraud, that may be replied (i).

If there are two or more obligees, a release by one will be a bar

(b) *Per Alderson, B., England v. Watson*, 11 M. & W. 333; *Robinson v. Brown*, 3 C. B. 54.

(c) *Underhill v. Matthews*, Bull. N. P. 171, and see *Player v. Bandy*, 10 Mod. 26.

(d) *Ashbee v. Pidduck*, 1 M. & W. 564.

(e) *Husband v. Davis*, 10 C. B. 645.

(f) *Dixon v. Parkes*, 1 Esp. 110.

(g) *Tuckey v. Hawkins*, 4 C. B. 655.

(h) *Per Lord Campbell, C. J., Amott v. Holden*, 18 Q. B. 603.

(i) See *Craib v. D'Aeth*, 7 T. R. 670, n. In *Legh v. Legh*, 1 B. & P. 447, where the obligor, after notice of the bond having been assigned, took a release from the obligee, and pleaded it to an action

brought by the assignee in the name of the obligee, the court (exercising, as it should seem, an equitable jurisdiction) set aside the plea. In order to call upon the court to exercise this equitable jurisdiction, it must be clearly made out, that there has been a fraud by some person upon the plaintiff, and that the defendant was a party to that fraud. In *Phillips v. Clagett*, 11 M. & W. 84, the court refused to set aside a plea of release, where the releasor had an immediate interest in the money sought to be recovered, and no fraud was shown. Such a plea may be set aside at the instance of the plaintiff's attorney. *Wright v. Burroughes*, 3 C. B. 344; if fraud be shown, *Jones v. Bonner*, 2 Exch. 230.

to all (*k*). In debt on bond, by several plaintiffs, as trustees, the defendant pleaded a release from one of the plaintiffs. On demurrer, the plea was held good; for the obligees only had the legal interest, and consequently the right to release; and a release from the one was a release from the others (*l*). If there are two or more obligors, a release to one may be pleaded in bar by the other, whether the bond be joint (*m*), or joint and several (*n*), for there is but one duty extending to all the obligors, and therefore a discharge of one is a discharge of all. The reason why a release to one debtor releases all jointly liable is, because, unless it were held to do so, the co-debtor, after paying the debt, might sue him who was released for contribution, and so in effect he would not be released (*o*). But in the case of a *joint* bond, a release given by the obligee to the *representative* of one of the obligors, it not appearing, either on the bond or condition, that two of them were sureties for the other, does not discharge the co-obligors, for, being a joint bond, on the death of one obligor, it survived to the others (*p*).

A release to one obligor is a release to both in equity, as well as in law (*q*). It is immaterial whether the release be by deed, or by operation of law (*r*); for where the obligee in a joint and several bond made one of two obligors his executor, who administered and died; it was held, that the surviving obligor was discharged: for a personal action once suspended by the voluntary act of the party entitled to it, is for ever gone and discharged (*s*). So where the obligee in a joint and several bond made one of two obligors his executor, *with others*, and the obligor executor administered; it was held, that the action was discharged as to all the obligors (*t*). But where one of two obligors makes the obligee his executor, the debt is not extinguished, unless the obligee has assets in his hands to the amount of the sum due on the bond (*u*). So where one of two obligors makes the obligee *and another* executors, and the obligee refuses, the debt is not released or discharged, unless there be assets, and the obligee or his executor may sue the other for

(*k*) 2 Roll. Abr. 410 (D) 1.

(*l*) *Bayley v. Loyd*, 7 Mod. 250.

(*m*) 2 Roll. Abr. 412, (G) pl. 4.

(*n*) *Ibid.*, pl. 5; 1 Inst. 232, a.

(*o*) *Per Patteson, J., North v. Wakefield*, 13 Q. B. 541.

(*p*) *Ashbee v. Pidduck*, 1 M. & W. 564.

(*q*) *Bower v. Swadlin*, 1 Atk. 294. See *Webb v. Hewitt*, 3 K. & J. 438.

(*r*) *Cheetham v. Ward*, 1 B. & P. 630. But a release by will is not sufficient. *Parsons v. Coward*, C. T. H. 357.

(*s*) *Dorchester v. Webb*, Sir W. Jones, 345, 3rd Res. See the exceptions to this rule mentioned, *Belshaw v. Bush*, 11 C. B. 191. Notwithstanding the legal ex-

tinguishment, in equity the bond will be considered as assets, available either to the residuary legatee, or heir at law, as the case may be. *Fox v. Fox*, 1 West. C. T. H. 162, and cases there cited. "The debt is considered to have been paid by the executor to himself, and becomes assets in his hands. Upon this supposition the rule in equity depends, which makes the executor accountable for the amount of his debt as assets." *Per Lord Tenterden, C. J., in Freakley v. Fox*, 9 B. & C. 134.

(*t*) *Cheetham v. Ward*, 1 B. & P. 630. See *Nicholson v. Revill*, 4 A. & E. 682.

(*u*) *Wankford v. Wankford*, 1 Salk. 305.

the debt (*x*). So if a sole debtor make his creditor and another person executors, and the creditor neither proves the will nor acts as executor, he may maintain an action against the other for his demand on the testator (*y*). If a feme obligee take the obligor to husband, this is a release in law; so if there be two feme obligees, and one of them takes the debtor to husband (*z*). The like law is, if two be bound in an obligation to a feme sole, and she takes one of them to husband, and the husband dies, the wife shall not have an action against the other obligor (*a*). But where a man, on the day of his marriage, gave a bond to the woman to whom he was to be married, by which he stipulated that his representatives should, within twelve months after his death, pay to his widow or her representatives, a sum of money; and the marriage took place, and afterwards the husband died; whereupon the widow brought an action against the representatives of the husband, on the bond; it was held, that the marriage did not operate as a release of the debt, the bond not being payable during the lifetime of the obligor (*b*).

To a plea, that the plaintiff by a deed of release had released one of two joint obligors, the plaintiff replied, that the release was given at the request of the defendant (the other obligor) and on the express condition that the release should not operate in his discharge; this was held bad, on the ground that it sought by the introduction of parol evidence to put on an instrument under seal a construction differing from the import of that instrument (*c*). But where to a declaration on a guarantie the defendant pleaded that the plaintiff had entered into a composition with the principal debtor, and the plaintiff replied that he did so with the knowledge of the defendant, and upon the agreement that it should not discharge the defendant from his liability upon the guarantie, it was held, upon a rule to arrest the judgment, that at any rate as it did not appear that the reservation of the plaintiff's right was not known to the other creditors, the agreement was binding on the defendant (*d*).

A deed releasing A., one of two joint debtors, from all manner of actions, suits, debts, claims, &c., but containing a reserve of remedies against B., the other debtor, is construed not as a release to A., for then it would operate as a release to B., which would be contrary to its evident intention, but as a covenant not to sue A. (*e*). A covenant not to sue will not operate as a release in its

(*x*) *Dorchester v. Webb*, W. Jones, 345.

(*y*) *Rawlinson v. Shaw*, 3 T. R. 557.

(*z*) 1 Inst. 264, b.

(*a*) 21 Hen. VII. 30.

(*b*) *Milbourn v. Ewart*, 5 T. R. 381.

(*c*) *Cocks v. Nash*, 9 Bingh. 341. *Acc*,

Brooks v. Stuart, 9 A. & E. 854. This would probably be a good equitable replication.

(*d*) *Davidson v. M'Gregor*, 8 M. & W. 755.

(*e*) *Price v. Barker*, 4 E. & B. 760.

own nature, but only by construction, to avoid circuity of action. Hence, if the obligee of a bond covenant not to sue one of two joint and several obligors, and if he do so, that the deed of covenant may be pleaded in bar, he may still sue the other (*f*). In *Lacy v. Kynaston*, 12 Mod. 551, the distinction between the covenant not to sue a sole obligor, and one of several obligors, is thus taken:—"A. is bound to B., and B. covenants never to put the bond in suit against A.; if afterwards B. will sue A. on the bond, he may plead the covenant by way of release. But if A. and B. be jointly and severally bound to C. in a sum certain, and C. covenant with A. not to sue him, that shall not be a release, but a covenant only; because he covenants only not to sue A., but does not covenant not to sue B.: for the covenant is not a release in its nature, but only by construction to avoid circuity of action; for where he covenants not to sue one, he still has a remedy; and then it shall be construed as a covenant and no more."—Thus, a covenant not to sue one of two joint debtors will not operate as a release to the other (*g*). So, *e converso*, in an action for a partnership debt, a covenant not to sue, entered into by one only of the creditors, cannot be set up as a release (*h*). Even in those cases where a covenant not to sue shall be construed to enure as a release to avoid circuity of action, the covenant not to sue must be a perpetual covenant, that is, a covenant not to sue at all; a mere covenant not to sue for a limited time will not have this effect (*i*), for, as a general rule, there cannot be a suspension of a personal right of action without extinguishment (*k*). In such case the party cannot plead the covenant in bar, but is put to his cross action on the covenant. But, if the obligee covenant not to sue the obligor before such a day, and, *if he do, that the obligor shall plead this as an acquittance*, and that the obligation shall be void, this is a suspension of the obligation, if the obligee performs the condition of not suing before the day, and a release, if he does not perform the condition and does sue before the day (*l*).

A bond was conditioned that the obligor should indemnify the obligee from all sums the latter should pay on account of the obligor; before the execution of the bond, the following memorandum was indorsed on it, *viz.*, "that the obligee *hath* given an undertaking not to sue upon the bond until after the obligor's death;" it was held that the memorandum was to be taken as part of the condition, and consequently that the bond was payable only by the representative of the obligor after his death (*m*).

(*f*) *Dean v. Newhall*, 8 T. R. 168.

(*g*) *Hutton v. Eyre*, 6 Taunt. 289;
Solly v. Forbes, 2 B. & B. 38.

(*h*) *Walmsley v. Cooper*, 11 A. & E. 216.

(*i*) *Thimbleby v. Barron*, 3 M. & W.
210; *Ford v. Beech*, 11 Q. B. 852.

(*k*) *Belshaw v. Bush*, 11 C. B. 191.
See in equity *Norton v. Wood*, 1 Russ. & My. 178.

(*l*) 1 Roll. Abr. 939, L. pl. 2; *Gibbons v. Vouillon*, 8 C. B. 483.

(*m*) *Burgh v. Preston*, 8 T. R. 483.

8. *Set-off* (n).

At the common law, mutual debts could not be set off. This inconvenience was remedied by the 2 Geo. II. c. 22, s. 13, made perpetual by the 8 Geo. II. c. 24, s. 4. Section 5 of the latter Act provides, that *mutual* debts (o) may be set against each other, "notwithstanding that such debts are deemed in law to be of a different nature; unless in cases where either of the said debts should accrue by reason of a penalty contained in any bond or specialty; and in all cases, where either the debt for which the action hath been or shall be brought, or the debt intended to be set against the same, hath accrued or shall accrue by reason of any such penalty, the debt intended to be set off shall be pleaded in bar; in which plea shall be shown how much is truly and justly due on either side (p); and in case the plaintiff shall recover in any such action or suit, judgment shall be entered for no more than shall appear to be truly and justly due to the plaintiff, after one debt being set against the other as aforesaid."

In debt upon a bail bond, brought by the officer of the Palace Court, to whom the defendant had given the bond conditioned for the appearance of A. B. to an action at the suit of C. D.; the defendant pleaded, by way of set-off, a greater sum due to him from the plaintiff, by simple contract. On demurrer the court gave judgment for the plaintiff; *Willes*, C. J. (who delivered the opinion of the court), observing, that as this was not a bond conditioned for the payment of money, the case was not within the 8 Geo. II. c. 24, and it was not within the 2 Geo. II. c. 22, because the plaintiff did not sue in his own right, but in the nature of a trustee for C. D.; that it might as well be said, that when a person sued as executor, the defendant might set off a debt from the plaintiff to the defendant, in his own right, as that the defendant could set off in the present case. He added, however, that if this had been a bond to the sheriff, assigned over to the party according to the statute, the court would have thought otherwise; and that the penalty must have been considered as the debt, this not being a case within the 8 Geo. II. c. 24 (q). To debt on bond conditioned for the payment of an annuity to the plaintiff, the defendant pleaded that a certain sum only was due to the plaintiff on account of the annuity, and that the plaintiff was indebted to the defendant in a larger sum of money, for money lent, &c., which he claimed to set off; on demurrer, it was adjudged, that this was a case within the 8 Geo. II. c. 24, s. 5, and that the defendant was entitled to set off his debt (r). To a declaration in debt by the

(n) See generally, *ante*, "Assumpsit," "Set-off," p. 181, *et seq.*, and as to the plea of set-off being divisible, *ante*, p. 488.

(o) Thus a debt due to a person in right of his wife cannot be set off in an action against him on his own bond.

Paynter v. Walker, Bull. N. P. 179.

(p) See *ante*, p. 184.

(q) *Hutchinson v. Sturges*, *Willes*, 261.

(r) *Collins v. Collins*, 2 Burr. 820.

assignees of a bankrupt for money received by the defendant to the use of the plaintiffs as assignees; plea, that the bankrupt *before* his bankruptcy was indebted to the defendant in a greater sum upon an account stated between them, and that the defendant was willing to allow the plaintiffs to set off against such debt the debt claimed in the declaration, was held ill on demurrer (s). Such a plea to be good must show mutual debts or credits between the bankrupt and the defendant (t).

Uncertain damages, or an unliquidated demand, cannot be made the subject of a set-off (u). Thus, if an agreement is entered into for the performance of covenants, with a penalty, and the covenants are broken, the penalty cannot be set off. To an action for money lent, the defendant pleaded articles of agreement, with mutual covenants, in a penalty, for performance, and showed a breach whereby the penalty became due, and offered to set off the same; on demurrer, the court held this plea not within the statute; Lord *Mansfield*, C. J., observing, that it was contrary to the intention of the Acts that the penalty should be admitted to be set off, when perhaps a very small sum was due for such damages as the plaintiff had actually sustained (x). But if two persons agree to perform certain work in a limited time, or to pay a stipulated sum weekly, for such time afterwards as it should remain unfinished, and a bond is prepared in the name of both, but is executed by one only, with a condition for the due performance of the work or the payment of the stipulated sum weekly, such weekly payments are in the nature of liquidated damages, and not by way of penalty, and may be set off by the obligee in an action brought against him by the obligor who executed (y). To an action of debt on a bond conditioned for the payment of the interest half-yearly and the principal sum six months after notice (which had not been given), a set-off equalling the interest due, which accrued *after* the interest became due, but before suit, is a good plea under the above section (z).

IV. Debt on Bail Bond.

At common law, the sheriff was not obliged to take bail from a defendant arrested upon mesne process, unless he sued out a writ of mainprize; but by 23 Hen. VI. c. 9 (a), it was enacted, that sheriffs, under-sheriffs, bailiffs of franchises, and *other bailiffs*, should let out of prison all persons by them arrested or being in

(s) *Groom v. Mealey*, 2 B. N. C. 138.

(t) *Bittleston v. Timmis*, 1 C. B. 389.

(u) *Howlet v. Strickland*, 1 Cowp. 56;

Weigall v. Waters, 6 T. R. 488.

(x) *Nedriff v. Hogan*, 2 Burr. 1024.

(y) *Fletcher v. Dyche*, 2 T. R. 32.

(z) *Lee v. Lester*, 7 C. B. 1008.

(a) This statute is (at all events since the 4 & 5 Anne, c. 16) a general law, of which the King's Courts will take cognizance, although it be not pleaded. *Samuel v. Evans*, 2 T. R. 569. See 2 Wms. Saund. 155, a. n. (d).

their custody, by force of any writ, &c., *in any action personal*, or by cause of indictment of trespass, upon reasonable surety of sufficient persons, having sufficient within the counties where such persons are let to bail, to keep their days in such place as the said writs, &c., shall require; persons in ward by condemnation, execution, *capias utlagatum*, surety of the peace, &c., or by special commandment of any justice, excepted. And no sheriff, &c., shall take, or cause to be taken or made, any obligation for any cause aforesaid, or by colour of their office, but only to *themselves*, of any person, nor by any person, which shall be in their ward by course of law, but by the name of their office, and upon condition written that the prisoners shall appear at the day and place contained in the writ, &c.; and if any sheriff, &c., take any obligation in other form, by colour of their office, it shall be void.

By 1 & 2 Vict. c. 110, arrest upon mesne process is abolished, except in certain cases. By the 3rd sect., if the plaintiff in any action in which the defendant is now liable to arrest, shall show by affidavit, to the satisfaction of a judge, that he has a cause of action to the amount of 20*l.*, and that there is probable cause for believing that the defendant is about to quit England (*b*), the defendant may, upon order of the judge, be arrested by a writ of *capias*, and held to bail for such sum, not exceeding the debt or damages, as the judge shall think fit. By sect. 4, it is enacted,—“that the defendant, when so arrested, shall remain in custody until he shall have given a bail bond to the sheriff, or shall have made deposit of the sum indorsed on such writ, &c., according to the present practice of the said superior courts, and all subsequent proceedings as to the putting in and perfecting special bail, or of making deposit, &c., shall be according to the like practice of the said superior courts, or as near thereto as the circumstances of the case will admit.”—The decisions under the 23 Hen. VI. c. 9, are, therefore, still applicable, and will now be considered.

The act directs bailiffs of franchises, “*and other bailiffs*,” to take bail, &c.—This does not authorize *sheriffs’* bailiffs to take obligations for the appearance of persons arrested: from the express mention of bailiffs of franchises, it appears that those officers only are meant, who have the return of process. When, therefore, the process is directed to the sheriff, the indemnity must be to him. *Rogers v. Reeves*, 1 T. R. 422. The marshal of the King’s Bench is an officer within the statute (*c*), but the serjeant-at-arms of the House of Commons is not (*d*).

(*b*) *i. e.*, for such a time that he is not likely to be forthcoming to satisfy the plaintiff’s execution at the period when he will be entitled to it in the ordinary course of law. An officer in the army, therefore, who is about to join his regiment abroad, may be arrested under the

above section. *Larchin v. Willan*, 4 M. & W. 351.

(*c*) *Bracebridge v. Vaughan*, Cro. Eliz. 66. The 1 & 2 Vict. c. 110, only mentions “*sheriffs*.”

(*d*) *Norfolke v. Elliot*, 1 Lev. 209.

"By force of any writ, &c. in any action personal."—Upon an attachment of privilege, attachment upon a prohibition, attachment in process upon a penal statute, the sheriff may be compelled to take bail by force of this statute (*e*), but not upon an attachment for contempt, issuing out of B. R. (*f*), or C. B. (*g*), or upon an attachment out of Chancery, the words "by force of any writ, bill, or warrant, in any action personal," being confined to actions at law (*h*). But although the sheriff is not compellable to take bail upon an attachment out of Chancery, yet he is not prohibited by the statute from doing so; and a bail bond so taken is good at common law, and may be enforced by the sheriff (*i*).

"Or by cause of indictment of trespass."—The sheriff is not authorized to take a bond for the appearance of persons arrested by him, under process issuing upon an indictment at the quarter sessions, for a trespass and assault; because at common law the sheriff could not bail any persons indicted before justices of the peace; and the 23 Hen. VI. c. 9, was not passed to enable the sheriff to take bail in cases where he could not bail before; but in order to compel him to take bail in those cases, where he might have taken bail, and neglected so to do. At common law, the sheriff might have bailed persons indicted before him at his torn, and, consequently, by this statute he was compellable to bail such persons; but the 1 Edw. IV. c. 2, having taken away the sheriff's power of bailing in such cases, the 23 Hen. VI. is in this respect rendered of none effect (*j*).

"Upon reasonable surety of sufficient persons."—According to the opinion of *Ashhurst, J.* (*k*), a security of a lower nature than a security by bond, as a simple contract undertaking, is insufficient; and the constant usage since the passing of the act has been for sheriffs and other officers to take a security *by bond* (*l*). Regularly, this bond ought to be taken with two or more sureties at the least, the words of the statute being "surety of sufficient persons;" and the sheriff, &c. may insist upon two sureties being given; yet it has been adjudged that, as the indemnity is for the protection of the sheriff, he may waive the benefit, and take a bond with one surety only (*m*).

"Having sufficient within the counties."—Hence, if the sureties

(*e*) *Field v. Workhouse*, Com. Rep. 264.

(*f*) *Anon.*, 1 Str. 479.

(*g*) *Field v. Workhouse*, *supra*.

(*h*) *Studd v. Acton*, 1 H. Bl. 468. An attachment out of Chancery, when for non-payment of costs, is in the nature, not of mesne, but final process. *Cobbett v. Hudson*, 13 Q. B. 497.

(*i*) *Morris v. Bayward*, 6 Taunt. 569.

(*j*) *Bengough v. Rossiter*, 4 T. R. 505.

(*k*) *Rogers v. Reeves*, 1 T. R. 421. If the sheriff refuses to take bail, sufficient sureties being tendered, an action on the case lies against him, *Smith v. Hall*, 2 Mod. 32; or debt for penalties under the statute, *Evans v. Moseley*, 2 Cr. & M. 490.

(*l*) The 1 & 2 Vict. c. 110, expressly mentions "a bail bond."

(*m*) *Drury's case*, 10 Rep. 100, b.

tendered have not sufficient within the county, the sheriff is not bound to accept them (*n*).

The form of surety prescribed by the statute must be strictly pursued, that is:—

1st. The bond must be made to the sheriff or other officer himself. Hence a bond made to the sheriff's bailiff is bad (*o*). It is to be observed, however, that the provisions of the statute are confined to securities given to the *sheriff* or other officer. Hence bonds given to the plaintiff are not within the statute (*p*); and consequently may be taken in a different form than that prescribed by the statute (*q*). So, also, undertakings given by the defendant or his attorney, to the *plaintiff or his attorney*, for the appearance of the defendant, are valid, and may be enforced by attachment (*r*).

2ndly. It must be made to the sheriff or other officer by the name of his office and county (*s*). On error in debt on bail bond, it was excepted, that it was not shown that the bond was to the sheriff by the name of his office. The court were of opinion that it should so appear; but they thought that in the present case it did sufficiently appear on the whole declaration, it being laid *solvend. eidem vicecomiti et assignatis* (*t*).

3dly. There must be a condition to the bond; and that condition must be for the appearance (*u*) of the defendant at the day (*x*) and place mentioned in the writ, &c., and for that only. Hence, if there be not any condition, or, what amounts to the same thing, if the condition be impossible (*y*), as where the condition is for the appearance of the defendant (*z*) at a day past (*a*), the bond is void. So if any other condition than that prescribed by the statute is expressed in the bond (*b*), it will be bad.

But if the bond be made to the sheriff by the name of his office, and the condition express the time (*c*) and place of appearance (*d*), a variance in other respects will be immaterial. As where the writ was to appear before our lord the king at Westminster, and the condition was to appear before his majesty's justices of the K. B.

(*n*) *Lovell v. Plumer*, 15 East, 320.

(*o*) *Rogers v. Reeves*, 1 T. R. 422.

(*p*) *Raven v. Stockdale*, Gouldsb. 66; *Leech v. Davys*, Aleyn, 58.

(*q*) *Hall v. Carter*, 2 Mod. 304.

(*r*) *Per Buller, J.*, *Rogers v. Reeves*, 1 T. R. 422.

(*s*) *Noel v. Cooper*, Palm. 378.

(*t*) *Symes v. Oakes*, Str. 893.

(*u*) By the effect of 1 & 2 Vict. c. 110, the writ of *capias*, as the commencement of an action, is abolished, and the condition of the bail bond under that statute is not for the appearance of the defendant, but for the putting in of special bail. Chitt. Forms, 382 (7th edit.).

(*x*) The writ of *capias*, under the 1 & 2 Vict. c. 110, directs special bail to be put in "within eight days after the execution thereof, inclusive of the day of such execution," but the provisions of the 23 Hen. VI. c. 9, are still applicable to the keeping of the day by so putting in bail. *Evans v. Moseley*, 2 Cr. & M. 490.

(*y*) *Graham v. Crawshaw*, 3 Lev. 74.

(*z*) See note (*u*), *supra*.

(*a*) *Samuel v. Evans*, 2 T. R. 569.

(*b*) *Rogers v. Reeves*, 1 T. R. 418.

(*c*) See *Evans v. Moseley*, 2 Cr. & M. 490.

(*d*) See note (*u*), *supra*.

at Westminster (*e*). So where the writ was to appear before the Barons, and the condition was to appear in the office of pleas in the Court of Exchequer at Westminster; it was held well enough (*f*). So where the writ was returnable "wheresoever, &c.," and the words "wheresoever, &c.," were omitted in the bail bond (*g*). So where the writ was to appear *wheresoever, &c.*, and the bond was conditioned for the appearance before the king at Westminster, the variance was held immaterial (*h*).

But where the writ was to appear before his majesty's justices of the Bench at Westminster, and the condition *before the king* at Westminster, the variance was held fatal, for they are different courts (*i*). And where the bond (under the 1 & 2 Vict. c. 110) in the condition thereof recited the delivery of the writ "to the said _____," and provided that "the said _____ do cause special bail, &c.," omitting the prisoner's name; the bond was held void, although it omitted the name in those two places only (*k*).

If the sheriff does not comply with the injunctions of the statute, and, without the plaintiff's consent, takes a security of a different kind than that prescribed therein, the courts will not afford him any relief, nor interpose in his favour, for the purpose of enforcing such security, on the ground of his having been guilty of a breach of his duty. Hence, where a sheriff's officer took an undertaking from the defendant's attorney, instead of a bail bond, for the appearance of the defendant, and bail above was not duly put in, and an action for an escape was brought against the sheriff, the court would not relieve him, by permitting him to put in and justify bail afterwards, although he offered to pay the costs of the action brought against him (*l*). So where the defendant's attorney gave the sheriff's officer an undertaking that he would give the sheriff a bail bond in due time, which he neglected to do, and the plaintiff recovered against the sheriff for the escape; the court refused to proceed summarily against the attorney at the sheriff's instance, to make him pay the debt and costs for his breach of faith, on the ground that the sheriff had been guilty of a breach of duty (*m*). So where the sheriff had taken a bond with *one* security only, the court refused to set aside, even on payment of costs, an attachment which had issued against him for not bringing in the body (*n*).

As to the manner of pleading, so as to take advantage of this statute, it may be remarked, that the special matter, which brings

(*e*) *Kirbride v. Dylke*, 2 Lev. 180.
 (*f*) *Philips v. Philips*, cited 2 Str.
 1156.
 (*g*) *Shuttleworth v. Pilkington*, 2 Str.
 1155.
 (*h*) *Jones v. Stordy*, 9 East 55.
 (*i*) *Renalds v. Smith*, 6 Taunt. 551;

but see *Crofts v. Stockley*, 5 Bingh. 32.
 (*k*) *Holden v. Raphael*, 4 A. & E. 228.
 (*l*) *Fuller v. Prest*, 7 T. R. 109.
 (*m*) *Sedgworth v. Spicer*, 4 East, 568.
 (*n*) *R. v. Sheriff of London*, 2 Bingh.
 227.

the case within the statute, must appear upon the record, but it is sufficient if it appears on any part of it (o).

Assignment of Bail Bond.—If the defendant does not put in and perfect bail above in due time, according to the condition of the bail bond, the bail bond is forfeited (p), unless it seems the defendant has surrendered before the return of the writ (q), and the sheriff has assented to such surrender (r) : and the plaintiff may take an assignment of the bail bond. This course is usually pursued, if the bail below are sufficient. Before the 4 Ann. c. 16, the sheriff was not compellable to assign the bail bond, though, if he had not assigned it, the court would have amerced him. Another mischief at common law was, that after an assignment of the bail bond, the action must have been brought in the name of the sheriff, who might have released the obligor(s), and thereby driven the plaintiff into a court of equity. To remedy these inconveniences, it was enacted by 4 Ann. c. 16, s. 20, that—If any person shall be arrested by any writ, &c., issuing out of any of her Majesty's courts of record at Westminster, at the suit of any common person, and the sheriff, or other officer, takes bail from such person, the sheriff, or other officer, at the request and costs of the plaintiff in such action or suit, or his lawful attorney, *shall* (t) assign to the plaintiff in such action the bail bond, or other security taken from such bail, by indorsing the same, and attesting it under his hand and seal, in the presence of two or more *credible* witnesses (u), which may be done without any stamp, provided the assignment so endorsed be duly stamped before any action brought thereupon : and if the bail bond or assignment, or other security taken for bail, be forfeited, the plaintiff in such action, after such assignment made, may bring an action thereupon, *in his own name* ; and the court, *where the action is brought*, may, by rule of the same court, give such relief to the plaintiff and defendant in the original action, and to the bail, as is agreeable to justice ; and such rule shall have the effect of a defeasance to the bail bond. By sect. 24, the act is to extend to all courts of record within the kingdom. But it does not apply to proceedings in equity (x).

In *Kitson v. Fagg*, 1 Str. 60, the question being, whether a bail bond was well assigned by an under-sheriff's clerk ? *Parker, C. J.*, said, that he had the advice of all his brethren, and they were of opinion, that an under-sheriff might assign a bail bond in the name of the high-sheriff, it having been the constant practice ever since

(o) *Per Buller, J.*, in *Samuel v. Evans*, 2 T. R. 575.

(p) *Harrison v. Davies*, 5 Burr. 2683.

(q) *Jones v. Lander*, 6 T. R. 122.

(r) *Hamilton v. Wilson*, 1 East, 383.

(s) *Shipley v. Craister*, 2 Ventr. 131.

(t) If the sheriff refuses to assign the

bail bond, it seems that an action on the case will lie against him for breach of the duty thus imposed.

(u) See *White v. Barrack*, 1 M. & W. 424.

(x) *Meller v. Palfreyman*, 4 B. & Ad. 146.

the 4 Ann.; but that if the assignment was neither by the sheriff, nor his under-sheriff, as in this case, it would not be good. In debt on a bail bond, the defendant pleaded that there was not any assignment of the bond by the sheriff or under-sheriff. It appeared in evidence, that the bond had been assigned by one of the under-sheriff's clerks. The case of *Kitson v. Fagg* was cited as an authority to show that this was not a good assignment. But Lord *Mansfield*, C. J., was clearly of opinion, that the seal to the assignment, being the seal of office, was sufficient to give it validity, whoever had signed it (*y*). The assignment is good, though the sheriff be out of office; the act does not say it shall be done during the shrievalty (*z*).

Although by this statute the court where the action was brought was expressly authorized to exercise an equitable jurisdiction, yet upon the supposition that every other court, except that where the original action was brought, was incompetent to exercise that jurisdiction, it was formerly held, that an action on the bail bond, whether brought by the assignee (*a*) or the officer (*b*), must be brought in that court where the original action was commenced. Now, by R. G. 83, H. T. 1853, the sheriff himself may sue in any court; but the assignee must still, as formerly, bring his action in the same court from which the process issued; advantage, however cannot be taken of the action having been brought in a wrong court, upon the plea of *non est factum* (*c*).

The assignment may be made in a different county from that in which the bail bond was given, and the venue may be laid in any county. Debt upon a bail bond; and plaintiff declares that he sued out a writ directed to the sheriff of Surrey, &c., who took a bail bond, which he afterwards assigned to the plaintiff at London, where the action was brought. Demurrer, on the ground that the action was founded on the bond entered into by the bail, and, that being laid to be done in Surrey, the action should have been there; but judgment for the plaintiff (*d*).

Declaration.—It is sufficient for the plaintiff to state in his declaration, that the sheriff assigned the bond to him *according to the statute*, without adding, that “the assignment was under the hand and seal of the sheriff;” and the defendant may plead, that he *did not assign, &c., according to the statute*, on which issue the plaintiff must prove that the assignment was, according to the statute, under the hand and seal of the sheriff (*e*). So though the statute requires the indorsement to be made by the sheriff in the presence of two witnesses, yet it is not necessary to set forth the

(*y*) *Harris v. Ashley*, Lond. Sitt. M. T. 1756, MS.

(*z*) *Hays v. Manning*, Serjt. Hill's MS. vol. 29, p. 68.

(*a*) *Morris v. Rees*, 2 W. Bl. 838.

(*b*) *Donatty v. Barclay*, 8 T. R. 152; but see *Newman v. Fawcitt*, 1 H. Bl. 631.

(*c*) *Wright v. Walmsley*, 2 Campb. 396.

(*d*) *Gregson v. Heather*, 2 Str. 727.

(*e*) *Dawes v. Papworth*, Willes, 408.

names of the witnesses in the declaration (*f*), or to aver that the assignment was made in the presence of two credible witnesses (*g*), or that the indorsement was attested by two credible witnesses (*h*). Nor is it necessary to state in the declaration, that the defendant in the original action was arrested (*i*), nor that the debt was sworn to by the plaintiff, nor that the sum sworn to was indorsed on the writ (*k*).

Bail to the sheriff are liable to the plaintiff's whole debt (without regard to the sum sworn to) and costs, to the extent of the penalty of the bail bond (*l*). After a defendant has been discharged out of custody upon the bail bond being given, it is neither in the power of the bail to render him, nor of the party to surrender himself again into the custody of the sheriff before the return of the writ, without the consent of the latter (*m*). But the sheriff may, if he pleases, accept the surrender of the party, who is willing to return into his custody, before the return of the writ. And if the sheriff consents to do so, and by virtue of such surrender has the defendant in his custody at the return of the writ, the court will then consider it as if no bail bond had been given: and, consequently, an action cannot, under these circumstances, be maintained against the sheriff for not assigning the bail bond (*n*); nor can he be proceeded against for not bringing in the body, although, upon being ruled to return the writ, he returned *cepi corpus* (*o*).

Pleas.—To an action of debt by the assignee of the sheriff upon a bail bond, *non est factum* may be pleaded. If issue be joined on *non est factum*, the only proof required on the part of the plaintiff (supposing there is not any other plea) is proof of the execution of the bail bond by the defendant (*p*); for the plea of *non est factum* does not put in issue any other allegation in the declaration; consequently, in such case, it is not necessary to prove the writ, assignment by the sheriff, &c.

In debt on bail bond, the defendant may plead performance of the condition, *viz.* under the 1 & 2 Vict. c. 110, that bail was put in and perfected, concluding with "as by the record of the recognizance remaining in the said court" (or the Court of Q. B. *as the case may be*) "fully appears;" for the recognizance being entered of record, is not triable by jury, but by the record (*q*). If the recognizance is not entered of record, the bond is, it seems, forfeited (*r*). To such a plea the plaintiff may reply *nul tiel record*, *viz.* that there is not any such record of the recognizance. When the record is of the *same* court, this replication ought to conclude with giving

(*f*) *Robinson v. Taylor*, Fort. 366.
 (*g*) *Lewis v. Parkes*, 3 M. & W. 133.
 (*h*) *Leafe v. Box*, 1 Wils. 121.
 (*i*) *Taylor v. Clow*, 1 B. & Ad. 223.
 (*k*) *Sharpe v. Abbey*, 5 Bingh. 193.
 (*l*) *Stevenson v. Cameron*, 8 T. R. 28.

(*m*) *Hamilton v. Wilson*, 1 East, 383.
 (*n*) *Stamper v. Milbourne*, 7 T. R. 122.
 (*o*) *Jones v. Lander*, 6 T. R. 753.
 (*p*) 10 Pl. R. H. T. 1853.
 (*q*) *Bret v. Sheppard*, 1 Leon. 90.
 (*r*) *Corbet v. Cook*, Cro. Eliz. (466).

a day to the defendant(s). This constitutes a complete issue of fact; and if in this case the defendant should demur to the replication, the plaintiff need not join in demurrer; but if the record is not produced at the day, the plaintiff may sign judgment (t). When the record is of *another court*, the court gives the defendant a day to bring it in (u). If the record is not brought into court on the day, judgment of failure of record is given (x).

To an action (y) of debt on a bail bond to the plaintiff as sheriff of Middlesex, the defendant pleaded, that the action was brought by the plaintiff, for the benefit of, and as trustees for, J. S. (the sheriff's officer,) by whom the defendant had been arrested, and to whom the defendant, after the return of the writ, but before the sheriff had been ruled to return the same, paid the debt and costs, which J. S. accepted in full satisfaction of the bond; and that if any damage had accrued for default of the defendant's appearance, according to the condition of the bond, it was occasioned by the default of the sheriff's officer not paying over the debt and costs to the plaintiff in the action, which would have been accepted by such plaintiff. It was contended, that to debt on bond the defendant might plead, that it was given to the plaintiff in trust for another; so as to let the defendant into a defence which he might have against the *cestui que trust*. The court, however, were of opinion that the plea was bad; Lord *Ellenborough*, C. J., observing, that as the officer could not have released the bond, he could not accept anything in satisfaction of it; and further, that it was not alleged that the bond was originally given to the sheriff in trust for the officer; nor did it appear how he afterwards came to have any equitable interest in it; consequently this was not brought within the case cited. So bail cannot plead the bankruptcy and certificate of their principal in their own discharge (z).

By R. G. 84, H. T. 1853, in all cases where the bail bond shall be directed to stand as a security, the plaintiff shall be at liberty to sign judgment upon it. By R. 85, proceedings may be stayed on payment of costs in one action, unless sufficient reason be shown for proceeding in more (a).

V. Debt on Bond, with Condition to perform Covenants.

At common law, it was usual for the obligee of a bond, with a penalty conditioned for the performance of covenants contained in another deed, to declare on the bond merely; to which the de-

(s) *Cremer v. Wickett*, Ld. Raym. 550; Chitt. Forms, 458 (7th edit.)

(t) *Tipping v. Johnson*, 2 B. & P. 303; R. G. 38 H. T. 1853.

(u) *Sandford v. Rogers*, 2 Wils. 113.

(x) See 1 Wms. Saund. 92, n. (3).

(y) *Scholey v. Mearns*, 7 East, 148.

(z) *Donnelly v. Dunn*, 2 B. & P. 47.

(a) See *Key v. Hill*, 2 B. & Ald. 598.

fendant usually pleaded performance generally; to this the plaintiff replied a breach of one of the covenants; and upon issue joined, and proof of such breach, the plaintiff was entitled not only to recover the penalty, that being the legal debt, but also to take out execution for the same: although the penalty far exceeded, in amount, the damages which he had sustained by the breach of covenant. Under these circumstances, the defendant could only obtain relief through the interposition of a court of equity, which would direct an issue of *quantum damnificatus*, and prevent any execution being enforced for more than the damage actually sustained. To prevent plaintiffs, in cases of this kind, from converting that power, which the strictness of the common law gave them, into an engine of oppression, and to avoid the circuitous mode of relief to which defendants were compelled to resort, it was enacted by 8 & 9 Will. III. c. 11, s. 8, that—In actions upon any bond, or penal sum, for the non-performance of any covenants or agreements contained in any indenture, deed, or writing, the plaintiff *may* assign as many breaches as he shall think fit, and the jury, upon the trial of such action, shall assess not only such damages and costs as have been heretofore usually done in such cases, but also damages for such of the assigned breaches as the plaintiff shall prove to have been broken; and like judgment shall be entered on such verdict as heretofore hath been usually done in such like actions.—

This statute is not confined to cases where the bond is conditioned for the performance of covenants in some other instrument than the bond; *the condition of the bond is an agreement in writing* within the statute (*b*). Neither is the statute confined to cases where there is a penalty to secure the performance of an act, on the non-performance of which the obligee would be entitled to recover uncertain damages: but it extends also to cases where the agreement is for the payment of a certain sum; as to bonds conditioned for the payment of an annuity (*c*), or the payment of a debt by yearly instalments (*d*). So it extends to bonds conditioned for the performance of an award, although it appears that only a single sum is to be paid on the bond; for the condition being to perform an award, in other words, to perform an agreement, comes directly within the words of the statute (*e*). But as the great object of the statute was to take away the necessity of applying for relief to a court of equity (*f*), it does not extend to bail (*g*), or replevin (*h*), or post obit (*i*) bonds, or to a warrant of attorney to enter up judgment, given as a security for a debt on demand (*k*),

(*b*) *Collins v. Collins*, 2 Burr. 826.

(*c*) *Walcot v. Goulding*, 8 T. R. 126.

(*d*) *Willoughby v. Swinton*, 6 East, 550.

(*e*) *Welch v. Ireland*, 6 East, 613.

(*f*) *Per Tindal*, C. J., 10 Bingh. 131.

(*g*) *Moody v. Pheasant*, 2 B. & P. 446.

(*h*) *Middleton v. Bryan*, 3 M. & S. 155.

(*i*) *Stair v. Earl of Murray*, 2 B. & C. 82.

(*k*) *Shaw v. Marquis of Worcester*, 6 Bingh. 385.

or to a bond with a penalty conditioned for the payment of money at a given day, with a stipulation that on any default in paying the interest, the whole sum should be demandable (*l*); for in these cases the court can relieve the defendant without his being compelled to file a bill in equity. Nor does the statute extend to common money bonds, that is, bonds with a penalty conditioned for the payment of a less sum of money at a day or place certain (*m*), for in cases of this kind defendants are sufficiently protected against an unconscientious demand of the whole penalty, by 4 Ann. c. 16, s. 13, by which it is enacted, that, if at any time pending an action upon any such bond, the defendant shall bring into court the principal, interest, and costs of suit, the same shall be taken in discharge of the bond, and the court shall give judgment accordingly.

The statute having been made for the protection and relief of the defendants, the words, "*may assign*," have been construed to be compulsory on the plaintiff (*n*); as have the words, "*may suggest*," in the subsequent part of the statute, where the defendant suffers judgment by default (*o*), or the plaintiff obtains judgment on demurrer (*p*). But it is not necessary, though not unusual, to assign the breaches in the declaration; it may be done in the replication, in answer to the defendant's plea of performance (*q*), or, if the defendant do not plead performance, by a suggestion in making up the issue (*r*).

Debt on the usual administration bond against the surety. Plea, *non est factum*, and issue by plaintiff, with a suggestion of several breaches. A rule to show cause why some of the breaches should not be struck out, or why the defendant should not be allowed to suffer judgment by default, and pay one shilling damages thereon, was refused; *Bayley*, B., observing, that in this case, on the suggestion, the jury were to inquire into the truth of the breaches; and that he was not aware of any case where a party had suffered judgment by default on such breaches; and it seemed to him contrary to the provisions of the statute that he should do so (*s*). *Bayley*, B., added, that the present was not the defendant's only course; he might have pleaded performance, and suffered judgment by default in answer to the replication (*t*).

If judgment shall be given for the plaintiff, on demurrer, or by confession, or *nihil dicit*, the statute directs that the plaintiff upon the roll *may suggest* (*u*) as many breaches of the covenants and

(*l*) *James v. Thomas*, 5 B. & Ad. 40.

(*m*) *Smith v. Bond*, 10 Bingham 125.

(*n*) *Hardy v. Bern*, 5 T. R. 636.

(*o*) *Roles v. Rosewell*, 5 T. R. 538.

(*p*) *Walcot v. Goulding*, 8 T. R. 126.

(*q*) *Scott v. Staley*, 4 B. N. C. 724. In such a case the jury may assess damages without a special venire.

(*r*) *Webb v. James*, 8 M. & W. 645.

See further Wms. Saund. i. 58, n. (1); ii. 187, n. (2).

(*s*) *Archbishop of Canterbury v. Robertson*, 1 Cr. & M. 181.

(*t*) 3 Tyrw. 419, n., S. C.

(*u*) No suggestion is necessary on a judgment by warrant of attorney. *Kinnersley v. Mussen*, 5 Taunt. 264.

agreements as he shall think fit, upon which shall issue a writ to the sheriff of that county where the action shall be brought, to summon a jury to appear before the justices or justice of assize, or *nisi prius*, of that county (*x*), to inquire of the truth of every one of those breaches, and to assess the damages that the plaintiff shall have sustained thereby; in which writ it shall be commanded to the said justices that they shall make a return thereof to the court, whence the same shall issue, at the time in such writ mentioned.

The only difficulty, in cases where a party obtains a judgment on demurrer or by default, and is obliged to proceed under the statute, respects the costs of the inquisition, which if the plaintiff does not obtain, he is in a worse condition than he would have been before the statute. To obviate this difficulty, Mr. Serjeant Williams, in a note to *Gainsford v. Griffith*, (1 Wms. Saund. 58,) recommends, that the judgment should be suspended until after the return of the inquisition, and proposes a form of entry for that purpose; to which form, Lord *Alvanley* (*y*) said, that he did not see any objection. His lordship, however, suggested another mode of proceeding, that is, that an application should be made to the court, to order the master to tax the costs of the inquisition, and then to add them to the sum to be levied under the execution. In debt on bond in the penal sum of 2,000*l.*, conditioned for the performance of covenants, defendants suffered judgment by default; whereupon the usual common law judgment in debt was entered for the recovery of the debt and damages; the plaintiff then proceeded to suggest breaches, upon which suggestion a writ of inquiry was awarded and executed, and damages and costs assessed; after which, the plaintiff entered a second judgment for the damages assessed under the writ of inquiry, and further costs adjudged by the court, and then entered a *remittitur* as to the costs. A writ of error having been brought; it was held, that the second judgment could not stand; and thereupon it was adjudged, that the second judgment, with the amerciamment, should be reversed, and that the former judgment should remain unimpeached (*z*).

In case the defendant, after such judgment, and before execution, shall pay into court, to the use of the plaintiff, his executors, &c., the damages so assessed, together with costs of suit, the statute provides that a stay of execution of the said judgment shall be entered upon record; or if, by reason of any execution executed, the plaintiff, or his personal representative, shall be fully paid or satisfied all such damages, with costs of suit, and all reasonable charges and expenses for executing the said execution,

(*x*) By 3 & 4 Will. IV. c. 42, s. 16, the writ shall be executed before the sheriff, unless otherwise ordered by the court where the action is pending, or by a judge

of one of the superior courts.

(*y*) *Hankin v. Broomhead*, 3 B. & P. 612.

(*z*) *Ibid.*

the body, lands or goods of the defendant shall be thereupon forthwith discharged from the said execution, which shall likewise be entered upon record; but, notwithstanding, in each case such judgment shall remain as a further security to answer to the plaintiff and his personal representative such damages as shall be sustained for further breach of any covenant in the said indenture, &c. upon which the plaintiff may have a *scire facias* (a) upon the said judgment against the defendant, or against his heir, terretenant, or personal representative; suggesting other breaches of the said covenants or agreements; and to summon him or them respectively, to show cause why execution shall not be had upon the said judgment: upon which there shall be the like proceeding, as was in the action of debt upon the said bond, for assessing damages upon trial of issue joined upon such breaches, or inquiry thereof, upon a writ to be awarded as aforesaid; and upon payment or satisfaction as aforesaid of such future damages, costs, and charges, all further proceedings are again to be stayed; and so *toties quoties*; and the defendant, his body, lands, or goods, shall be discharged out of execution as aforesaid.

If the plaintiff proceeds to execution, without a *scire facias*, the court will set aside the execution, and order the money levied under it to be restored, although the new breaches have taken place within a year after judgment recovered (b). The plaintiff cannot in the *scire facias* suggest anything as a breach that he might have originally suggested (c).

The above provisions of the 8 & 9 Will. III. c. 11, are expressly excepted from the operation of the Common Law Procedure Act, 1852, by the 96th section of that act.

VI. Debt on Bond of Ancestor against Heir.

Debt will lie against an heir, having assets by descent in fee simple, on the obligation of his ancestor, wherein the heir is expressly bound. "The executor more actually represents the person of the testator, than the heir does the person of the ancestor; for if a man binds himself, his executors are bound, though they be not named: *but so it is not of the heir*" (d). The law considers the bond of the ancestor, wherein the heir is bound, as becoming, upon the death of the ancestor, the heir's own debt, *in respect of the assets*, which the heir has in *his own right*, and holds him liable upon such bond, to the value of the land descended; "because the inheritance of the ancestor, which creates a lien upon the

(a) See the form Chitt. Forms, 523 (7th edit.). It must be tested, directed and proceeded upon in the same way as writs of revivor under the Com. Law Proc. Act, 1852, sect. 132.

(b) *Willoughby v. Swinton*, 6 East, 550.

(c) 2 Wms. Saund. 187 c, n. (g).

(d) 1 Inst. 209, a. See, also, *Barber v. Fox*, 2 Saund. 136.

heir, is possessed by the heir *jure proprio*, and not *alieno*, as the personal estate is by the executor (e)."

Although it is the debt of the defendant, because his ancestor has bound him, yet he is not liable any further than to the value of the land descended; and as soon as he has paid his ancestor's debt, to the value of the land, he is entitled to hold the land discharged (f). Where the obligor has heirs and lands on the part of his father and on the part of his mother, both heirs shall be equally charged (g). The possession of a tenant for years, being a rightful possession, is considered in law as the possession of the heir, and therefore gives him a seisin in fact. A. seised of land in fee simple, at the time of her death in the possession of a tenant from year to year, died, leaving B. her heir-at-law. No rent was ever paid to him, it being supposed that the land passed to a devisee under the will of A. After the death of B., his son and heir brought ejectment and recovered the land. It was held, that B. was seised *in fact* of the land in question, which descended from him to his son, and was therefore assets in the hands of the son and heir, liable to the bond debt of the ancestor (h).

If the defendant is only collateral heir of the obligor, the mesne descents ought, strictly speaking, to be stated in the declaration (i). But this rule applies only to descents from persons seised in fee simple in possession (k); and, generally, the plaintiff being presumed to be a stranger to the defendant's pedigree, it is *not* necessary for him to state in the declaration how the defendant is heir (l). The Common Law Procedure Act, 1852, has moreover provided, by sect. 143, that upon motions in arrest of judgment, or for judgment *non obstante veredicto*, "by reason of the non-averment of some alleged material fact or facts, or material allegation, or other cause, the party, whose pleading is alleged or adjudged to be therein defective, may, by leave of the court, suggest the existence of the omitted fact or facts, or other matter, which, if true, would remedy the alleged defect, &c."

Creditors by specialty should be careful to make the debtor bind his heir; as thereby they will be entitled to a priority in the distribution of assets by courts of equity under the 3 & 4 Will. IV. c. 104, making freehold and copyhold estates assets (m).

Of the Pleas.—To this action the heir may plead, that he has not, nor had at the commencement of the suit, any lands or

(e) Gilb. Debt, B. 2, c. 1. The debt is not, however, a lien upon the land from the ancestor's death, but only capable of being made so by the suit of the party.

(f) *Buckley v. Nightingale*, 1 Str. 665.

(g) 11 Hen. VII. 12, b.

(h) *Bushby v. Dixon*, 3 B. & C. 298.

(i) *Jenk's case*, Cro. Car. 151; but see *Heard v. Baskerville*, Hob. 232.

(k) *Kellow v. Rowden*, Carth. 126.

(l) *Denham v. Stephenson*, Salk. 355.

(m) See *post*, tit. "Executors," s. VI. in fin. See, also, the 9th section of 1 Will. IV. c. 47, to which a similar remark applies.

tenements, by hereditary descent from the ancestor in fee simple (*n*). This plea is termed a plea of *riens per descent*. "In an action against the heir-at-law for a debt of his ancestor upon specialty, the ground of the charge is, that he is bound as well as the ancestor, and therefore it is in the debet and detinet, as it would have been against the ancestor; and the law gives him liberty to discharge himself by pleading nothing by descent, or but so much; which plea, if found false, he is charged as a person bound for the whole debt, if he had but one acre (*o*); which is not the case of an executor, who is charged only for so much as comes to his hand, notwithstanding such plea found false." *Per Lord Hardwicke, C. (p)*.

The common replication to the preceding plea is, that the defendant had assets by descent in fee simple: or a joinder of issue under sect. 79 of the Common Law Procedure Act, 1852. Upon this issue the plaintiff must prove assets (*q*); but proof of assets in the county of A. will support an allegation of assets in the county of B.; for assets or not, is the substance of the issue, and the place is named only for conformity (*r*). On the other hand the heir may give in evidence a bond, acknowledged by his ancestor to the king, and an extent thereon against the heir, [to the amount of the assets descended] (*s*). But the extent only, without the production of the bond, or an examined copy thereof, is insufficient (*t*).

Upon this issue questions formerly arose, whether the heir took by purchase or descent; with respect to which it was held, that if lands were devised to the heir, and the devise did not make any alteration, either in the tenure, quality, or limitation of the estate; *i. e.* if the devise conveyed to the heir the same estate as the law would have cast on him by descent, then the heir took by descent, although by the terms of the devise there was either a possibility of a charge (*u*), or an actual charge or incumbrance on the lands, *e. g.* payment of debts (*x*), legacies (*y*), annuities or rent (*z*), and the like; or although there was an executory devise over, on the happening of a certain event, if the quantity and quality of the estate were not thereby altered (*a*). But now, by 3 & 4 Will. IV. c. 106, s. 3, when any land shall have been devised by any testator to the heir, or to the person who shall be the heir, of such testator, such heir shall be considered to have acquired the land as a devisee, and not by descent; and when any land shall have been limited

(*n*) Doctr. pl. 181.

(*o*) *i. e.*, at common law, but this is altered by the 1 Will. IV. c. 47, *post*, p. 534.

(*p*) 1 Ves. sen. 212.

(*q*) As to what shall be assets by descent, see 2 Wms. Saund. 8 g, *in notis*.

(*r*) 6 Rep. 47, a.

(*s*) *Horne v. Adderley*, Ld. Raym. 734, 735.

(*t*) *Sherwood v. Adderley*, Ld. Raym. 734.

(*u*) *Olerk v. Smith*, Salk. 241.

(*x*) *Allam v. Heber*, Str. 1270.

(*y*) *Haynsworth v. Pretty*, Cro. Eliz. 833.

(*z*) *Emerson v. Inchbird*, Ld. Raym. 728.

(*a*) *Doe v. Timins*, 1 B. & Ald. 530.

by any assurance to the person, or to the heirs of the person, who shall thereby have conveyed the same, such person shall be considered to have acquired the same as a purchaser by virtue of such assurance, and shall not be considered to be entitled thereto as his former estate or part thereof. See this statute, *post*, tit. "Ejectment."

The language of the plea being, that the defendant had not any lands by descent, at the commencement of the suit, the defendant cannot avail himself of an alienation *pending* the suit, and the lands so aliened will still remain charged (b). If upon issue joined on the plea of *riens per descent* the plaintiff prove that lands came to the defendant by descent, and the defendant give in evidence a conveyance of the same lands by himself to a stranger, before action brought, the plaintiff may, to encounter this evidence, prove that the conveyance was fraudulent, and therefore void by 13 Eliz. c. 5 (c). The heir cannot plead assets in the hands of the executors; for it is at the election of the obligee to sue either the heir, or the executors (d). A plea by the heir that he claims to retain a certain sum of money laid out in *repairs*, not stating them to be necessary repairs, of the tenements descended, cannot be supported (e). And *quære*, whether the plea would be aided by this averment (f).

Liability of Heir under 1 Will. IV. c. 47.—At the common law, if the heir had made a *bond fide* alienation of the lands descended, before action brought, he was discharged (g), and he might have pleaded this in bar; consequently there was not any remedy against him at law; although in equity he was responsible for the value of the land aliened (h). But now, by 1 Will. IV. c. 47, s. 6 (i), the heir is rendered liable in an action of debt or covenant, *to the value of the land aliened* before action brought against him; and such execution shall be taken out upon any judgment obtained against such heir, *to the value of* the said land, as if it was his own debt, but not beyond (k); saving that the land, *bond fide* aliened before action brought, shall not be liable to such execution (l).

"By taking proper proceedings (in equity) the specialty creditors may obtain payment out of the descended or devised real estate in the hands of the heir or devisee (m), but if such proceedings are not

(b) 1 Inst. 102, a, b.

(c) *Gooch's case*, 5 Rep. 60, a.

(d) 10 Hen. VII. 8, b., *per Vavasour*, J. C. B., and *Cape's case*, 1 And. 7.

(e) *Shetelworth v. Neville*, 1 T. R. 454.

(f) 2 Wms. Saund. 7 b, n. (h).

(g) *Termes de la Ley*, V. Assets.

(h) *Per Lord Macclesfield*, Ch., in *Coleman v. Winch*, 1 P. Wms. 777.

(i) This clause, and the 7th, with the

exception of the additional remedy by covenant, are almost *verbatim* the same with the 5th and 6th sections of 3 W. & M. c. 14, now repealed, except as to persons who died before 16th July, 1830.

(k) *Brown v. Shuker*, 2 C. & J. 311.

(l) This saving extends to devisees. *Mathews v. Jones*, 2 Anst. 506.

(m) See 3 & 4 Will. IV. c. 104, *post*, tit. "Executors, VI."

taken, the heir or devisee may aliene, and in the hands of the alienee, the land is not liable, though the heir or devisee remains personally liable to the extent of the value of the land aliened" (*n*).

By the 7th section it is provided,—That where debt or covenant upon a specialty is brought against any heir, he may plead *riens per descent* at the commencement of the action; and the plaintiff may reply, that he had lands, &c. from his ancestor, *before* the commencement of the action; and if, upon issue joined thereupon, it be found for the plaintiff, the jury shall inquire of the value of the lands, &c. so descended (*o*), and thereupon judgment shall be given, and execution awarded as aforesaid, (that is, against the heir, to the value of the land, as if the same were the proper debt of the heir); but if judgment be given against such heir, by confession of the action without confessing assets descended (*p*), or upon demurrer, or *nilhil dicit*, it shall be for the debt and damage, without any writ to inquire of the lands, &c. so descended.

Liability of Devisee under Statute.—Before the 3 W. & M. c. 14, persons who had bound themselves and their heirs by bond, or other specialties, used frequently to aliene the lands of which they were seised in fee simple, by devise, for the purpose of defrauding their creditors; because, at common law, such lands, in the hands of the devisee or alienee, were not liable to the specialty creditor. To remedy this inconvenience, several provisions were made by that statute (*q*), which was repealed by 1 Will. IV. c. 47, which, reciting, that it is not reasonable that by the contrivance of "debtors" their "creditors" should be defrauded of their just "debts," by sect. 2 enacts, that:—

All wills, testamentary limitations, dispositions or appointments then made, or thereafter to be made by any person concerning any manors, lands, &c., or any rent, &c. or charge out of the same, whereof any person at the time of his decease shall be seised in fee simple, in possession, reversion or remainder, or have power to dispose of the same by will (*r*), shall be deemed (only as against such person and his heirs, successors, executors, &c. with whom the person making such will, &c. shall have entered into any bond, covenant, or other specialty binding his heirs,) to be fraudulent and void. And by sect. 3—Every such creditor may maintain debt or covenant (*s*) upon the bonds, covenants and specialties, against the heir and devisee, or devisee of such devisee, *jointly* (*t*),

(*n*) *Per Lord Langdale, Richardson v. Horton*, 7 Beav. 112.

(*o*) If they do not, a *venire de novo* will be awarded. *Brown v. Shuker*, 1 C. & J. 583.

(*p*) In a plea under the statute the heir or devisee must show the particular lands devised. *Per Willes, C. J.*, *Willes*, 524.

(*q*) See *Galton v. Hancock*, 2 Atk. 432.

(*r*) This extends to estates *pur autre vie*. *Westfaling v. Westfaling*, 3 Atk. 465.

(*s*) Under the 3 & 4 W. & M. c. 14, debt only could have been maintained. *Wilson v. Knubley*, 7 East, 128.

(*t*) It is necessary to join both at law. *Warren v. Stawell*, 2 Atk. 125; in equity, *quare*, *Bridges v. Hinzman*, 16 Sim. 71.

and such devisee shall be chargeable for a false plea in the same manner as the heir is, or for not confessing the lands descended. By sect. 4—If there is not any heir at law, the creditor may bring debt or covenant against the devisee solely (*u*). The 5th section contains an exception in favour of limitations, appointments, devises, or dispositions made for the payment of debts (*x*), or for raising portions for children, in pursuance of any marriage contract *bond fide* made before marriage. The 8th section provides, that every devisee made liable by the act shall be chargeable in the same manner as the heir (*y*), notwithstanding the lands, &c. shall be aliened before action.

The intention of the statute was to prevent three inconveniences: 1, that the creditor should not be defrauded by a devise; or 2, by alienation; 3, that the heir should not be charged with the whole debt by his false plea, as, at the common law, he was; and the alteration introduced by the statute was to enable the creditor to recover, after the alienation of the heir; but then he is to take proof of the value upon himself, and recover no more of his debt than the value of the lands amounted to (*z*). The act only applies to cases where a "debt," in the ordinary meaning of the word, not a mere contingent liability, exists between the parties in the lifetime of both; where, therefore, A. became surety by deed for the performance of covenants by B., and A. died *before* breach, it was held that A.'s devisees were not liable under the statute (*a*) for a subsequent breach of covenant by B. (*b*).

Judgment.—If the heir confesses the action, and declares with certainty the assets which he has by descent, the judgment shall be that the plaintiff do recover his debt and damages, to be levied of the assets descended (*c*). If the heir confesses the action, and says that he has nothing by descent but a reversion, after the death of A. B., of so many acres of land, situate, &c., the plaintiff may pray a special judgment, that he recover the debt and damages to be levied of the said reversion, *quando acciderit* (*d*). Formerly, if the heir pleaded *riens per descent* (*e*), or payment by a co-obligor (*f*), and it was found against him, the judgment was general; that is, to recover the debt and damages; but in reference to the former plea, this is altered by the statute.

Execution.—As the judgment in debt against an heir, upon

(*u*) Under the 3 & 4 W. & M. c. 14, this could not be done. *Hunting v. Shel-drake*, 9 M. & W. 256.

(*x*) See *Gott v. Atkinson*, Willes, 521.

(*y*) See *ante*, p. 534.

(*z*) *Ibid*.

(*a*) 3 W. & M. c. 14; but the provisions of the 2 Will. IV. c. 47, are in this respect the same.

(*b*) *Farley v. Briant*, 3 A. & E. 839.

(*c*) *Davy v. Pepys*, Plowd. 438.

(*d*) Dy. 373, b.; *per Holt*, C. J., Carth. 129.

(*e*) 21 Edw. III. 9, b. pl. 28; Doctr. pl. 181; *Allen v. Holden*, 2 Roll. Abr. 71, pl. 8.

(*f*) *Brandlin v. Milbank*, Carth. 93.

riens per descent pleaded and found against him, was general, so was the execution; but under the statute, if the heir pleads *riens per descent*, the execution is limited to the value of the lands found by the jury (*g*). Thus it was held, that the plaintiff might have execution, by writ of elegit, of a moiety of *all* the lands of the heir; as well of those which the heir had by purchase, as of those which he had by descent (*h*). The plaintiff, however, is not compelled to sue out an elegit in this case (which, before the 1 & 2 Vict. c. 110, might have put him to a disadvantage), but he may suggest that the defendant has certain lands (describing them) by descent, and pray execution against such lands; for possibly the heir may not have any other than those which he has by descent (*i*). And now, by 1 & 2 Vict. c. 110, all the lands of the debtor, and not a moiety only, may be extended under an elegit.

If the heir suffers judgment to go by default, and does not show with certainty the assets descended, the judgment shall be general, and the execution may be awarded against the heir as for his own debt, by *ca. sa.* against his person (*j*), or *fi. fa.* against his goods and chattels (*k*). So if judgment is given against the heir upon demurrer, the body of the heir may be taken in execution (*l*). So, if the heir is condemned on any plea whatsoever (except that of *riens per descent*) or by default, or without plea for any cause, the practice is for the plaintiff to have execution of the body of the heir, or his goods, or elegit of his lands, unless he confesses the debt, and shows the certainty of the lands descended (*m*).

VII. Debt on Judgment.

Debt lies upon a judgment, within or after the year after the recovery (*n*). An action of debt may be maintained upon a judgment recovered in one of the courts of the city of London by special custom; although the original action could not have been brought in the superior courts (*o*). Debt lay on a judgment for damages in a real action (*p*); for, by the judgment, the damages were reduced to personalty (*q*). So on a judgment in *scire facias* on a recognizance (*r*). Debt also lies upon a judgment in an inferior court; but the declaration must allege, that the cause of action in the

(*g*) *Brown v. Shuker*, 2 C. & J. 311.

(*h*) *Hinde v. Lyon*, 2 Leon. 11.

(*i*) 2 Roll. Abr. 71, pl. 3.

(*j*) *Barber v. Borne*, Cro. Eliz. 692;
Trewinard's case, Plowd. 440, b.

(*k*) *Pozon v. Smart*, C. B. Hil. 4 Geo. II. MS.

(*l*) *Greensmith v. Brockhole*, cited in Plowd. 440, b.

(*m*) *Davy v. Pepys*, Plowd. 440, b.;

Smith v. Angell, Id. Raym. 783.

(*n*) 43 Edw. III. 2, b.

(*o*) *Mason v. Nicholls*, 1 Roll. Abr. 600, (N.) pl. 8.

(*p*) By 3 & 4 Will. IV. c. 27, s. 36, all real and mixed actions, except a writ of right of dower, writ of dower, *quare impedit*, and ejectment, are abolished.

(*q*) 43 Edw. III. 2.

(*r*) *Lovelesse's case*, 2 Leon. 14.

original suit arose within the jurisdiction of the inferior court (*t*); it is not enough to allege, that the plaintiff recovered his damages within that jurisdiction. Debt also lies on a foreign judgment (*u*). Debt on judgment lies only where the judgment remains unsatisfied (*x*). Hence, where the defendant had been taken in execution on a judgment, and afterwards was discharged out of custody, with the consent of the plaintiff, upon entering into an agreement to pay the debt by instalments, part whereof the defendant had accordingly paid, but had failed in payment of the remaining part; it was held, that the plaintiff could not maintain an action upon the judgment (*y*). An action of debt on a judgment against one of several parties against whom the judgment has been recovered, being founded on the consequent duty, cannot be distinguished in principle from the ordinary case of an action of debt against one of several joint contractors; to which an objection cannot be taken on the ground of variance, but only, if at all, by way of plea in abatement (*z*). The venue in this action must be laid in the county where the judgment was given, and not in the county where the original cause of action arose (*a*). The defendant cannot plead *nil debet* (*b*). If there be not any such record as the plaintiff has declared on, the defendant must plead *nul tiel record*; which issue is tried by producing the record itself, if it be a record of that court where the action is brought, or by a certified copy thereof duly sealed (*c*), or by a copy purporting to be certified (*d*).

By 10 R. G. H. T. 1853.—“Where a defendant shall plead a plea of judgment recovered, he shall in the margin of such plea state the date of such judgment; and if such judgment shall be in a court of record, the number of the roll on which such proceedings are entered, if any; and in default of his so doing, the plaintiff shall be at liberty to sign judgment as for want of a plea; and in case the same be falsely stated by the defendant, the plaintiff, on producing a certificate from the proper officer or person having the custody of the records or proceedings of the court where such judgment is alleged to have been recovered, that there is no such record or entry of a judgment as therein stated, shall be at liberty to sign judgment as for want of a plea” (*e*). The above rule does not, it seems, apply to judgments pleaded by executors (*f*).

A writ of error pending on the judgment may be pleaded in abatement (*g*), but not in bar (*h*). If the defendant bring a writ

(*t*) *Read v. Pope*, 1 C. M. & R. 302. There is an exception to this rule, in case of a judgment of nonsuit or *non pros.* in the inferior court, and the defendant in the court below bringing an action on the judgment for his costs; here it is impossible to aver it, for it may have been the very cause of the nonsuit. *Murray v. Wilson*, 1 Wils. 317.

(*u*) See p. 486.

(*x*) *Jaques v. Withy*, 1 T. R. 557,

(*y*) *Vigers v. Aldrich*, 4 Burr. 2482.

(*z*) *Cocks v. Brewer*, 11 M. & W. 51.

(*a*) *Hall v. Winefield*, Hob. 196.

(*b*) 11 Pl. R. H. T. 1853.

(*c*) 1 & 2 Vict. c. 94, s. 13.

(*d*) 14 & 15 Vict. c. 99, s. 11.

(*e*) See *Brokenshir v. Monger*, 9 M. & W. 111.

(*f*) *Power v. Izod*, 1 B. N. C. 304.

(*g*) *Aby v. Buxton*, Carth. 1.

(*h*) *Rogers v. Mayhoe*, Carth. 1.

of error, and the plaintiff bring another action on the judgment and recover, he cannot sue out execution on the second judgment, until the writ of error be determined (i).

Costs.—The more regular, as well as the least expensive, mode by which a plaintiff may reap the benefit of his judgment, is by writ of execution; hence, the proceeding by action on the judgment being considered vexatious and oppressive, it was enacted by the 43 Geo. III. c. 46, s. 4, that the plaintiff in such action shall not recover costs, unless the court in which the action is brought, or some judge of the same court, shall otherwise order. The above statute extends only to judgments recovered by plaintiffs, and not to actions brought by the defendant in the original action to recover the costs of a judgment of nonsuit (k). The object of the act, however, being to prevent parties from rashly bringing actions of debt on records, and so *creating* costs (l), they will be allowed if the proceedings have become necessary (m). By the 128th section of the C. L. P. Act, 1852, execution may now issue within six years from the recovery of the judgment, if the parties be alive, without revival. As after that time a writ of revivor or an action on the judgment must be brought, and in the former case the plaintiff would be *entitled* to his costs, (sect. 131), there seems no reason for refusing them in the latter (n).

VIII. Debt for Rent Arrear.

If a lease be of lands or tenements for years (o), or at will (p), rendering rent, debt lies for the recovery of rent arrear, by the common law. So if a lease be for life, debt lies for the arrears by the common law after the estate of freehold is determined (q); and by 8 Ann. c. 14, s. 4, though a lease for life be *continuing*, any person having rent due on such lease may bring debt for the same, in the same manner as if due upon a lease of years. But debt does not lie by the grantee or devisee of an annuity against the grantor or devisee of the land, either at the common law, if the grantee or devisee takes a freehold (r), or by the statute, for that only applies to cases between the lessor and lessee (s). So if land be conveyed by A. to B., his heirs and assigns, to the intent that C., his heirs and assigns, may receive a yearly rent thereout, C. cannot bring debt for the rent against B. (t); unless there is an absolute covenant by B. to pay it (u).

(i) *Taswell v. Stone*, 4 Burr. 2454;
Benwell v. Black, 3 T. R. 643.

(k) *Bennett v. Neale*, 14 East, 343.

(l) *Per Tindal, C. J., Fraser v. Moses*
1 D. N. S. 705.

(m) *Garrawell v. Baker*, 5 Taunt. 264.

(n) *Gray on Costs*, 168, 169.

(o) Litt. s. 58.

(p) *Ibid.* s. 72.

(q) 1 Roll. Abr. 596, pl. 11.

(r) *Kelly v. Clubbe*, 3 B. & B. 130.

(s) *Webb v. Jiggs*, 4 M. & S. 113.

(t) *Randall v. Rigby*, 4 M. & W. 130.

(u) *Varley v. Leigh*, 2 Exch. 446.

At common law, if a person seised of rent-service, rent-charge, rent-seck, or fee-farm, in fee-simple or fee-tail, died, and there was rent arrear, neither his heir nor executor could maintain an action of debt for such rent (*x*): the heir was not competent to sue, because he was a stranger to the personal contracts of his ancestor; and the executor was incompetent, inasmuch as he did not represent his testator as to any contracts relating to the freehold and inheritance. To obviate this, it was enacted by 32 Hen. VIII. c. 37, s. 1, that an executor or administrator of any person seised of such rents in fee, in tail, or for life, might maintain debt against the person who ought to pay the same, and his personal representative (*y*). As to what persons are within this statute, see *post*, tit. "Distress," IV. The devisee (*z*) however, or assignee (*a*) of rent, reserved on a lease for years and disconnected with the reversion, might maintain debt for the rent, or for the arrears thereof (*b*), at the common law, and, it seems, without attornment (*c*); but by the 4 Ann. c. 16, s. 9, attornment is not necessary.

The action must be brought against the persons who took the profits when the rent became in arrear, or against their executors or administrators (*d*). If A. make a lease for life, or a gift in tail, reserving a rent, that is a rent-service within the 32 Hen. VIII. c. 37 (*e*). The act is remedial, and extends to the executors of all tenants for life (*f*). If a lessee for years assign over the term, reserving a rent, he may maintain debt for such rent arrear, although he has not any reversion (*g*).

Declaration.—It is a general rule, that, whenever an action is founded on a deed, the deed must be declared upon. But the action of debt, for rent arrear, forms an exception to this rule; for in this case it is not necessary to declare upon the deed (*h*). Debt for rent, by the lessor against the lessee, may be brought either where the land lies, or the deed was made (*i*); but debt by the grantee of the reversion against the lessee (*k*), or by the lessor against the assignee of the term (*l*), or by the grantee of the reversion against the assignee of the term (*m*), is maintainable on privity of estate only; it is consequently local, and must be brought in the county where the lands are. If the venue is laid in the wrong county, advantage may be taken of it on demurrer (*n*), if it appear on the face of the record; otherwise it should, it seems, be

(*x*) 1 Inst. 162, a.

(*y*) The action is local, and must be brought where the land lies; Bull. N. P. 177; but under 3 & 4 Will. IV. c. 42, s. 22, may, under certain circumstances, be tried in any county.

(*z*) *Ards v. Watkin*, Cro. Eliz. 637.

(*a*) *Robins v. Cox*, 1 Lev. 22.

(*b*) *Colborne v. Wright*, 2 Lev. 240.

(*c*) *Rivis v. Watson*, 5 M. & W. 266.

(*d*) 1 Inst. 162, b.

(*e*) *Ibid.*

(*f*) *Hool v. Bell*, Ld. Raym. 172.

(*g*) *Newcomb v. Harvey*, Carth. 161.

(*h*) *Atty v. Parish*, 1 Bos. & Pull. N. R. 109.

(*i*) *Patterson v. Scott*, 2 Str. 776.

(*k*) *Bord v. Cudmore*, Cro. Car. 183.

(*l*) *Per Cur.* in *Patterson v. Scott*.

(*m*) *Barker v. Damer*, Carth. 183.

(*n*) 2 Lev. 80; 1 Wils. 165.

pleaded (o). Debt for rent against an executor of lessee is transitory (p), if it is for arrears in the testator's lifetime; but where it is for rent accrued in the executor's time, it must be where the land lies; for in this case, the executor is charged as assignee on the privity of estate, and not on the privity of contract (q).

If A. demises land by indenture to B. for years, yielding rent, and B. dies, making C. his executor, the lessor may have debt against the executor for the rent reserved and arrear, after the death of the lessee, although the executor never entered nor agreed; for the executor represents the person of the testator, and the testator by the indenture was estopped and concluded during the term to pay the rent upon his own contract; and, therefore, although the rent is higher than the profit of the land, yet the executor cannot waive the land, but, notwithstanding that, he shall be charged with the rent (r). So *Wyndham, J.* (s), said, that an executor cannot waive a term, so as not to be charged for the rent, if he has assets: for he is bound to perform all the contracts of the lessor, if he has assets, be the rent above the value of the land or not: which was not denied. And *Kelynge, J.*, said, that he could not so waive it, but that he should be charged in the detinet, on which the assets would come into question. And if he continues the possession, he shall be charged in respect of the reception of the profits, whether he has assets or not: to which *Twysden, J.*, agreed. But he may plead the special matter, *viz.* that he has no assets, and that the land is of less value than the rent (t).

Pleas.—In debt for rent, upon a demise of land, if the rent be reserved by deed the defendant may plead *non est factum*; if without deed, *non dimisit*, or nothing in arrear, or that the defendant never entered. The plea of *nil debet* shall not be allowed in any action; 11 Pl. R. H. T. 1853. In debt for rent, against the lessee (u), or his personal representative (x), an assignment before the rent became due cannot be pleaded in bar of the action; for the privity of contract remains notwithstanding the assignment: but an assignment and an acceptance by the lessor of the assignee as his tenant may be pleaded in bar, either by the lessee (y) or his personal representative (z); for the lessor may charge the lessee or assignee at his election, but when he has determined his election by accepting rent from the assignee, he cannot afterwards resort to the lessee, for the privity of estate is destroyed (a). Upon this principle it was held, that debt would not lie against the lessee for

(o) *Boyes v. Hewetson*, 2 B. N. C. 575.

(p) *Gilb. Debt*, B. 2, c. 2.

(q) *Cormel v. Lisset*, 2 Lev. 80.

(r) *Howse v. Webster*, Yelv. 103.

(s) *Helier v. Casebert*, 1 Lev. 127.

(t) *Billingshurst v. Speerman*, Salk.

(u) *Walker's case*, 3 Rep. 22, a.

(x) *Helier v. Casebert*, 1 Lev. 127.

(y) *Marsh v. Brace*, Cro. Jac. 334.

(z) *Marrow v. Turpin*, Cro. Eliz. 715.

(a) *Per Bayley, J., Thomas v. Cook*, 2 B. & Ald. 121; *Davidson v. Gent*, 1 H. & N. 744, acc.

rent accruing after his bankruptcy, when he had ceased to occupy the premises, and the assignee was in possession under the commissioners' assignment, the lessor's assent to such assignment being virtually included in the statute authorizing it, and being equivalent to an express assent (*b*).

Eviction.—In debt, as in other remedies for rent arrear, an eviction may be pleaded in bar, for that occasions a suspension of the rent; but care must be taken that an eviction (*c*), or such facts as amount in law to an eviction, be stated in the plea; for if a mere trespass (*d*), or an illegal ouster (*e*) only, be stated, the plea will be insufficient. See *post*, tit. "Replevin." If there be eviction from the land, or the lease determine before the legal time of payment, no rent shall be paid; for there shall never be any apportionment in respect of part of the time, as there shall be in respect of part of the land (*f*). Hence, at common law, if a tenant for life made a lease for years, rendering rent at Easter, and the lessee occupied for three quarters of a year, and in the last quarter before Easter the tenant for life died: in this case there was not any apportionment of rent for the three quarters of a year. Now however by 11 Geo. 2, c. 19, s. 15—Where a tenant for life dies before or on the day on which the rent is reserved or made payable, upon any lease of lands, &c., which determines on the death of such tenant for life, his personal representative may, in an action on the case, recover from the under-tenant of such lands, &c., if the tenant for life die on the day on which the same was made payable, the whole, or if before such a day, then a portion of such rent, according to the time the tenant for life lived, of the last year, or quarter of a year, or other time in which the said rent was growing due, making all just allowances, or a proportional part (*g*). By the 4 & 5 Will. IV. c. 22, s. 1, rents reserved on leases of lands, &c. which have been and shall be made, and which leases determine on the death of the person making the same (although such person was not strictly tenant for life thereof), or on the death of the life for which such person was entitled to such hereditaments, are to be considered as within the foregoing provision. And by sect. 2,—

(*b*) *Wadham v. Marlowe*, 8 East, 314, n. But assumpsit lies against a lessee from year to year upon his agreement to pay rent during the tenancy, notwithstanding his bankruptcy, and the occupation of his assignees during part of the time for which the rent accrued. *Boot v. Wilson*, 8 East, 311, and *post* "Use and Occupation."

(*c*) *Hunt v. Cope*, Cowp. 242.

(*d*) *Reynolds v. Buckle*, Hob. 326.

(*e*) *Vochell v. Dancastell*, Moor. 891.

(*f*) *Chun's case*, 10 Rep. 128, a.

"Where our books speak of an appor-

tionment in case where the lessor enters upon the lessee, *in part*, they are to be understood where the lessor enters *lawfully*, as upon a surrender, forfeiture, or such like, where the rent is lawfully extinct *in part*." 1 Inst. 148, b. "If there be lawful eviction from *part* by an elder title, it is clear that the rent is apportioned only, and not suspended." *Per Cur.*, *Neale v. Mackenzie*, 2 C. M. & R. 84.

(*g*) See *Botheroyd v. Woolley*, 5 Tyrw. 522.

"All rents-service reserved on any *lease* by a tenant in fee, or for any life interest, or by any lease granted under any power (*h*) (and which leases shall have been granted after the passing of this act, 16 June, 1834), and all rents-charge and other rents, annuities, pensions, dividends, moduses, compositions, and all other payments of every description, in G. B. and I., made payable, or coming due at fixed periods under any instrument that shall be executed after the passing of this act (*i*), or (being a will or testamentary instrument) that shall come into operation after the passing of this act, shall be apportioned so and in such manner that on the death of any person interested in any such rents, annuities, &c., or in the estate, fund, office, or benefice, from or in respect of which the same shall be issuing or derived, or on the determination by *any other means whatsoever* of the interest of any such person, he or she and his or her executors, administrators, or assigns, shall be entitled to a proportion of such rents, annuities, &c., according to the time which shall have elapsed from the commencement or last period of payment thereof respectively (as the case may be), including the day of the death of such person, or of the determination of his or her interest, all just allowances and deductions in respect of charges on such rents, &c., being made; and that every such person, his or her executors, administrators and assigns, shall have such and the same remedies at law and in equity for recovering such apportioned parts of the said rents, &c. when the entire portion, of which such apportioned parts shall form part, shall become due and payable, and not before, as he, she, or they would have had for recovering and obtaining such entire rents, annuities, &c., if entitled thereto, but so that persons liable to pay rents reserved by any lease or demise, and the lands, &c. comprised therein, shall not be resorted to for such apportioned parts specifically as aforesaid, but the entire rents of which such portions shall form a part shall be received and recovered by the person or persons, who if this act had not passed would have been entitled to such entire rents: and such portions shall be recoverable from such person or persons by the parties entitled to the same under this act, in any action or suit at law or in equity." By sect. 3, the above provisions are not to apply to cases in which it shall be expressly stipulated that no apportionment shall take place, or to sums payable on policies of assurance.

The above section does not, it seems, apply to cases where the landlord by his own act determines the tenancy, *e. g.* by bringing ejectment, but only to those where the rent continues and is to be apportioned between the individual who was entitled when it began to accrue, and another who has come in as remainder-man or reversioner, or otherwise (*k*). Lord Cottenham, C. (*l*), held, that the

(*h*) See *Lock v. De Burgh*, 4 De G. & Sm. 470.

(*i*) See *Knight v. Boughton*, 12 Beav.

312.

(*k*) *Oldershaw v. Holt*, 12 A. & E. 590.

(*l*) *In re Markby*, 4 M. & Cr. 484.

statute does not apply to rents, payable by tenants from year to year, which have not been reserved by an instrument in writing; and *Wigram, V. C. (m)*, held, that the death of the person interested in the rent or other payment—the event on which the apportionment is to take place—must be understood as a death occasioning the determination of the interest; and therefore that the act does not apply to any cases except those in which the interest of the party entitled to the rents, annuities, or other periodical payments, determines by death or some other means, so that there is no apportionment of rent as between the heir and personal representative of a tenant in fee (*n*).

Nil habuit in tenementis.—If the plaintiff declares upon an indenture of lease, the defendant cannot plead *nil habuit in tenementis*, or *non dimisit*; because the defendant, by the execution of the counterpart of the indenture, is estopped from controverting either the power of the plaintiff to demise or the actual demise (*o*): but otherwise it is, where the demise is by deed poll (*p*), or by parol. In debt for rent reserved upon a lease by indenture, if the defendant pleads *nil habuit in tenementis*, the plaintiff need not reply the estoppel, but may demur; because, the declaration being on the indenture, the estoppel appears on the record (*q*). But if the plaintiff will not rely on the estoppel, but takes issue on the plea of *nil habuit*, &c., he waives the estoppel, and the jury shall find the truth (*r*). A declaration in debt on a demise for rent, stated that the plaintiff by deed demised to defendant certain premises, to which the defendant pleaded that the plaintiff did not by deed demise the premises. It appeared that since the rent became due the deed was cancelled by the mutual consent of both parties. It was held that the cancelled deed was evidence in proof of this issue (*s*). If to debt on a demise without deed, the defendant pleads *nil habuit in tenementis*, the plaintiff ought, it seems, strictly, to show in his replication what estate he had in the premises. But it is, it seems, sufficient if he replies, "that he had a good and sufficient title," or joins issue under the 79th sect. of the Common Law Procedure Act, 1852, for the defect in the replication will be aided by the verdict (*t*). *Nil habuit in tenementis* cannot be pleaded in debt for use and occupation (*u*).

Payment.—"Where rent is reserved generally, the proper place for payment, the place appointed by law, is the land out of which it issues" (*x*). It is, therefore, it seems, a good plea to an action of

(*m*) *Brown v. Amyot*, 3 Hare, 173.

(*n*) *Acc. re Clulow*, 3 K. & J. 690.

(*o*) *Gilb. Debt*, B. 3, c. 3.

(*p*) *Adm. Lewis v. Willis*, 1 Wils. 314; but *quære*, if there has been occupation under the deed; *Curtis v. Spitty*; and see *Taylor v. Needham*, 2 Taunt. 278.

(*q*) *Heath v. Vermeden*, 3 Lev. 146.

(*r*) *Trevivan v. Lawrence*, 1 Salk. 277.

(*s*) *Lord Ward v. Lumley*, 5 H. & N. 656; 29 L. J. Ex. 372.

(*t*) *Gill v. Glasse*, *Yelv.* 227.

(*u*) *Curtis v. Spitty*, 1 B. N. C. 15.

(*x*) *Per Bayley, J., Rowe v. Young*, 2 B. & B. 234.

debt for rent, where no particular place of payment is mentioned in the deed, that the defendant was on the demised premises for a sufficient time next before the setting of the sun on the day when the rent became due to allow for the counting of the money, ready to pay the rent if the plaintiff had come to receive it, and that he has always since been ready to pay the same, concluding by payment of the amount into court (*y*).

Statute of Limitations.—By 21 Jac. I. c. 16, s. 3, actions of debt for arrearages of rent shall be commenced and sued within six years next after the cause of such actions. The statute is a good defence to a yearly tenant who has not within the last six years occupied the premises either actually or constructively, or paid rent, or done any act from which a tenancy can be inferred, although the tenancy has not been determined by a notice to quit (*z*). It is confined to actions for arrears of rent, upon a demise without deed, and does not extend to cases of rent reserved by specialty (*a*). By the 3 & 4 Will. IV. c. 27, s. 42, no arrears of rent or of interest in respect of any money charged upon or payable out of any land or rent, or any damages in respect of such arrears of rent or interest, shall be *recovered* by any distress, action, or suit, but within six years next after the same shall have become due, or next after an acknowledgment of the same in writing shall have been given to the person entitled thereto or his agent, signed by the person by whom the same was payable or his agent. By the 3 & 4 Will. IV. c. 42, s. 3, all actions of debt for rent upon an indenture of demise shall be commenced and sued within twenty years after the cause of such actions or suits, but not after.

Whether the former of the two statutes of William applied, when passed, to all rent, and the latter only established an exception in the case of rent due on an indenture of demise, or whether the former statute applied only to rents for which a *real* remedy (by assize) would formerly have lain (which latter seems the better opinion (*b*),) the effect of the conjoint enactments is, that no more than six years' arrears of rent or interest in respect of any sum, charged on or payable out of any land or rent, can be recovered by distress, action or suit, other than and except an action of covenant or debt for rent on a specialty, in which case the limitation is twenty years (*c*).

Debt for Use and Occupation (*d*).—In the case of a demise, not by deed, the action of debt for use and occupation has been substituted for the ancient method of declaring in debt for rent. This

(*y*) *Adm. Haldane v. Johnson*, 8 Exch. 689; *secus* in covenant, *ibid*.

(*z*) *Leigh v. Thornton*, 1 B. & Ald. 625.

(*a*) *Freeman v. Stacy*, Hutt. 109.

(*b*) *Grant v. Ellis*, 9 M. & W. 113.

(*c*) *Hunter v. Nockolds*, 1 Mac. & G. 653. See *ante*, "Covenant," *Statute of Limitations*, p. 472.

(*d*) See *post*, tit. "Use and Occupation."

action lies at the common law, and is not defeated by proof of a demise not under seal (*e*), reserving a certain rent (*f*).

The generality of the form of declaring, permitted in the action for use and occupation, renders it very convenient; for it has been held, that a declaration in debt, not setting forth any demise of the premises, nor for what term or what rent they were demised, nor how long the defendant had occupied them, nor when the sum claimed to be due for the use and occupation became due, nor for what space of time, is sufficient to enable the plaintiff to recover for use and occupation (*g*). So where the declaration omitted the place where the premises were situated (*h*). Hence the action is transitory and not local (*i*). The inconvenience resulting to the defendant from this general form of declaring, is remedied by permitting the defendant to call on the plaintiff for the particulars of his demand. But where the lands were misdescribed in the particulars of demand, but it was proved that the defendant held but one parcel of land of the plaintiff, so that he could not have been misled, it was held to be no objection to the plaintiff recovering (*k*).

Debt for Double Value.—By 4 Geo. II. c. 28, s. 1,—If tenants for life, lives, or years, or other persons coming into possession of any lands, &c. under, or by collusion with, such tenants, shall wilfully hold over after the determination of their term, and after demand made, and notice in writing given, for delivering the possession thereof, by their landlord or lessors, or persons entitled to the reversion or remainder of such lands, &c. or their agents (*l*); such persons so holding over shall, for the time they shall so hold over, pay to the persons kept out of possession, their executors, administrators, or assigns, at the rate of double the yearly value of the lands, tenements and hereditaments so detained, for so long time as the same are detained, to be recovered by action of debt, whereunto the defendant shall be obliged to give special bail, against the recovery of which penalty there shall not be any relief in equity.—

“I am aware that a tenant for half a year, or a smaller portion of a year, may, for some purposes, be considered and denominated a tenant for years. But this is a penal statute, and to be construed strictly. I cannot therefore include a tenant *from week to week* in the description of tenants for life, lives, or years: and I do not remember any instance of a tenant for a less time than a year

(*e*) By 8 & 9 Vict. c. 106, s. 3, all leases “required by law to be in writing” are void, unless made by deed.

(*f*) *Gibson v. Kirk*, 1 Q. B. 350. The first case in which it was determined, that an action of debt might be maintained for use and occupation, was *Stroud v. Rogers*, 6 T. R. 62, *in notis*.

(*g*) *Stroud v. Rogers*, *supra*.

(*h*) *King v. Fraser*, 6 East, 348.

(*i*) *Egler v. Marsden*, 5 Taunt. 25.

(*k*) *Davies v. Edwards*, 3 M. & S. 380.

(*l*) A receiver under the Court of Chancery is an agent within the statute. *Wilkinson v. Colley*, 5 Burr. 2694; and see *Poole v. Warren*, 8 A. & E. 582.

being held within the statute." *Per* Lord *Ellenborough*, C. J. (m). As to a tenancy by the quarter, *quære* (n).

A tenant who holds over, under a fair claim of right, will not be considered as wilfully holding over within the meaning of the statute: though it may be decided eventually that he had no right (o). To be liable he must hold over wilfully and contumaciously, and with a consciousness that he has no right to do so (p). Where, on receipt of a notice to quit by two joint tenants (q), one of them, who did not occupy, said "he had nothing to do with the land;" it was held that this statement was not admissible to rebut the presumption of wilfulness (r).

In *Wilkinson v. Colley*, 5 Burr. 2694, the court, considering this as a remedial law in favour of landlords, the penalty being given to the party grieved, held, that a notice to quit in writing included a demand. On the authority of this case it was held, by three judges, that where a woman, tenant from year to year, had received a written notice to quit, and before the expiration of the year married, it was not necessary for the landlord to make a demand on the husband, in order to entitle him to maintain an action against the husband, on the statute, for wilfully holding over. *Chambre, J.*, differed from the other judges, conceiving that a demand ought to be made, upon the party against whom a penal action is brought (s). *Note*.—In a case of this kind the husband may be sued alone, and it is not necessary to join the wife for conformity, the husband being in possession of the estate at the time when possession is to be delivered, and consequently the offence being committed by him; for the offence, which consists in not complying with the demand to deliver possession at the time when it ought to be complied with, is not complete until the day for delivering possession arrives (s). A notice and demand in writing are necessary, although the tenancy is at an end by the expiration of the term without any notice; and, notwithstanding the order in which the words stand in the statute, from which it would seem that the notice ought to be given *after* the determination of the term, yet the notice may be given before the expiration of the term (t). The demand and notice, however, may also be given afterwards, *e. g.* six weeks afterwards, the landlord not having in the mean time done any act to recognize the continuance of the tenancy; but the landlord will be entitled to double the yearly value only from the time of such notice and demand (u), and cannot recover the single value as on an implied tenancy for the time between

(m) *Lloyd v. Rosbee*, 2 Campb. 453.

(n) See *Wilkinson v. Hall*, 3 B. N. C. 508.

(o) *Wright v. Smith*, 5 Esp. 203.

(p) *Swinfer v. Bacon*, 6 H. & N. 846
(*in error*); 30 L. J., Ex. 368.

(q) One of two joint tenants is not

(*semble*) liable for the holding over of his co-tenant without his assent. *Draper v. Crofts*, 15 M. & W. 166.

(r) *Hirst v. Horn*, 6 M. & W. 393.

(s) *Lake v. Smith*, 1 N. R. 174.

(t) *Cutting v. Derby*, 2 Bl. R. 1075.

(u) *Cobb v. Stokes*, 8 East, 358.

the expiration of the tenancy and the notice. The right to recover double value is not waived by the landlord giving a second notice after the expiration of the first (x).

To ascertain the amount which the tenant holding over is to pay under the statute, the value of the soil itself, and every thing which, by having been attached to it, becomes part of the soil, must be estimated; and that value is what an occupier would give, and the landlord would otherwise have received, for the use of the freehold and every thing connected with it, during the time that the possession is withheld; but where the plaintiff, being the owner of a woollen-mill and steam-engine, let to the defendant a room in the mill, together with a supply of power from the steam-engine, by means of a revolving shaft in the room; it was held, in an action for double value under this statute, that in estimating such double value, the value of the power supplied could not be included (y).

One tenant in common may maintain an action on this statute without his companion, for double the yearly value of his moiety (z). He *must* indeed sue alone, if there has been no joint demise (a).

An action on this statute may be brought after a recovery in ejectment. The defendant, after having held of the plaintiff a farm for fourteen years, received a regular notice to quit on the 12th of May, 1806, and the possession was then demanded of him; but he held over till the 7th of February, 1807; whereupon the plaintiff brought ejectment and recovered possession; and afterwards brought an action of debt upon the statute for double the yearly value of the premises, in the interval between the expiration of the notice to quit (which was the day of the demise in the ejectment), and the time of recovering the possession under the ejectment. It was objected, on the part of the defendant, that the plaintiff having recovered the premises by the ejectment, and thereby treated the defendant as a *trespasser*, the action of debt upon the statute, in which, as it was said, the defendant was proceeded against as *tenant*, could not be maintained; but, *per* Lord *Ellenborough*, C. J., there is no incongruity in the landlord's bringing this action for the double value after a recovery in ejectment. The legislature considered that, in many cases, the single value might not be a compensation to the landlord for having been kept out of possession by the misconduct of the tenant, and therefore they gave him double the value. It has no reference to any antecedent remedy which the landlord had to recover possession by ejectment, but is cumulative. The two actions are brought *diverso intuitu*; the ejectment is in order to get possession of the premises wrongfully withheld; the action of debt for the double value is in order to indemnify the

(x) *Messenger v. Armstrong*, 1 T. R. 53.

(y) *Robinson v. Learoyd*, 7 M. & W. 48.

(z) *Cutting v. Derby*, 2 Bl. Rep. 1077.

(a) *Wilkinson v. Hall*, 1 B. N. C. 713.

landlord for the wrong. The other judges concurred with the C. J. (b).

In *Ryal v. Rich*, 10 East, 48, the plaintiff declared in the first count for double the yearly value; and in the second for use and occupation. The defendant pleaded the general issue to the first count, and to the second a tender of the amount of the single rent, and paid the money into court, which the plaintiff took out, but proceeded to trial. It was contended, on the part of the defendant, that the acceptance of the tender, which must be taken to be an admission by the landlord, that the defendant held the premises as *tenant*, and that he received the tender as *rent*, operated as a waiver of the penalty. But the court held, that the plaintiff was not estopped from taking the money as part of the larger sum claimed, and that going on with the suit showed that he did not mean to take it in satisfaction of the lesser sum.

Debt for Double Rent.—By 11 Geo. II. c. 19, s. 18—If any *tenant* shall give notice of his intention to quit the premises holden by him, at a time mentioned in such notice, and shall not deliver up the possession thereof accordingly, then such tenant, his executors, or administrators, shall, thenceforward, pay to the landlord double the rent which he should otherwise have paid, to be levied (c), sued for, and recovered at the same times and in the same manner as the single rent could; and such double rent shall continue to be paid during all the time such tenant shall so continue in possession.

A tenant for a year under a parol demise is a tenant within this statute (d); but a weekly tenant, it seems, is not (e). There would be an incongruity in applying the remedy given by this statute for double rent after the remedy by ejectment, which treats the person in possession as a trespasser and not as tenant. *Per Lord Ellenborough*, C. J., 9 East, 314. The notice need not be in writing (f). But it must be a *valid* notice, such as would entitle the landlord to bring ejectment (g). And there must be some fixed time mentioned in it. A notice that the tenant will quit as soon as he can get another situation will not enable the landlord to recover under the statute, although he can prove that the tenant had got another situation. *Farrance v. Elkington*, 2 Campb. 591. A tenant who, after having given notice to quit, holds over for a year and then pays double rent, under the above statute, is not liable to an action for double rent if he quits at the expiration of such year without giving a fresh notice, for the double rent is payable only

(b) *Soulsby v. Neving*, 9 East, 310.

(c) *i.e.*, by distress. This remedy was pursued in *Timmins v. Rowlison*.

(d) *Timmins v. Rowlison*, 3 Burr. 1603.

(e) *Sullivan v. Bishop*, 2 C. & P. 359.

(f) *Timmins v. Rowlison*, 3 Burr. 1603.

(g) *Johnson v. Huddleston*, 4 B. & C. 922.

while he *continues in possession* (*h*). By the acceptance of a single rent the landlord, it seems, waives his right to recover double rent under the statute (*i*).

By 3 & 4 Will. IV. c. 42, s. 3—All actions for penalties, damages, or sums of money, given to the party grieved, by any statute now or hereafter to be in force, shall be commenced and sued within two years after the cause of such actions or suits.

IX. *Debt for Penalties.*

By 31 Eliz. c. 5, s. 2—In any declaration or information the offence against any penal statute shall not be laid to be done in any other county but where the contract or other matter alleged to be the offence was in truth done (*k*), and every defendant in such action, &c., may allege that the offence was not committed in the county where such offence is alleged, which, being tried for the defendant, or if the plaintiff be thereupon nonsuit in his information or suit, the plaintiff shall be barred in that action or information. By sect. 5, all actions brought for any forfeiture upon a penal statute, whereby the forfeiture is limited to the *King only*, shall be brought within two years next after the offence committed. And all actions brought for any forfeiture upon a penal statute, (except the statute of tillage,) the benefit whereof is limited to *the King and the prosecutor*, shall be brought by any person that may lawfully pursue the same within one year after the offence committed; and, in default thereof, the same shall be brought for the king, at any time within two years after that year ended. And if any action shall be brought after the time before limited, the same shall be void. Provided (sect. 6), that where a shorter time is limited by any penal statute, the action shall be brought within that time.

This statute extends to all actions brought upon penal statutes, whereby the forfeiture is limited to the king, or to the king and the party, *whether made before or since the statute* (*l*), but not to actions of debt brought by the party grieved (*m*) (which however must, by the 3 & 4 Will. IV. c. 42, s. 3, be commenced and sued within two years of the cause of action), or, it seems, as to the time limited for bringing the action, to cases where the *whole* penalty is given to the common informer (*n*), and therefore it does apply where a moiety of the penalty is given to the poor of the parish (*o*). If any offence prohibited by any penal statute be also an offence at common law, the prosecution of it as an offence at

(*h*) *Booth v. Macfarlane*, 1 B. & Ad. 904.

(*i*) *Gilder v. Gildoe*, cited Cowp. 245.

(*k*) See *Smith v. Bond*, 11 M. & W. 549.

(*l*) *Barber v. Tilson*, 3 M. & S. 434.

(*m*) *Fife v. Bousfield*, 6 Q. B. 100.

(*n*) 1 Show. 354, *in notis*.

(*o*) *Frederick v. Lookup*, 4 Burr. 2018.

common law is not restrained by this statute. The defendant may take advantage of this statute on the general issue, and need not plead it (*p*). In actions brought on penal statutes, it is incumbent on the plaintiff to show that an action was commenced within the limited time (*q*).

By 21 Jac. I. c. 4, s. 1—All offences against any penal statute, for which any common informer may ground a popular action, bill, plaint, suit, or information, before justices of assize, justices of *nisi prius* or gaol delivery, justices of *oyer and terminer*, or justices of peace in their general or quarter sessions, shall be commenced, sued, prosecuted, tried, recovered, and determined by way of action, plaint, bill, information, or indictment, before the justices of assize, &c., of every county, city, &c., having power to determine the same, wherein such offences shall be committed, and not elsewhere save only in the said counties; and the like process shall be as in actions of trespass at common law; and all informations, actions, &c., by the attorney-general, or other officer, or common informer, in any of the courts at Westminster, for any of the said offences, penalties, or forfeitures shall be void. By sect. 2—The offence shall be alleged to have been committed in the county where such offence was in truth committed; and if, on the general issue, the plaintiff or informer shall not prove the offence, *and that the same was committed in the county in which it is laid*, the defendant shall be found not guilty. By the 3rd section—No officer in any court of record shall receive, file or enter of record any information, bill, &c., grounded upon a penal statute, until the informer has first taken an oath (to be entered of record) before some of the judges of the court, that the offence was not committed in any other county than where, by the said information, bill, &c., the same is supposed to have been committed, and that he believes in conscience, that the offence was committed within a year before the information or suit, within the same county.

The above statute does not extend to subsequent penal laws (*r*); consequently, in an action founded on the 12 Ann. c. 16 (against usury), it is not necessary that there should be an affidavit that the offence was committed in the county where, and within a year before, the action was brought (*s*). Wherever, by any act in force at the time when this statute passed, the informer might have sued by action or information in the inferior courts, as well as in the courts at Westminster, he is now confined to sue in the former; but, as the statute does not give any new jurisdiction to the inferior courts (*t*), the party may still sue in the courts at Westminster for

(*p*) 21 Jac. I. c. 4, s. 4, *infra*.

(*q*) *Maugham v. Walker*, Peake's N. P. C. 163; *i.e.*, if the general issue "by statute," is pleaded.

(*r*) *Hick's case*, Salk. 373; *R. v. Galle*, Salk. 372; *Ld. Raym.* 370; *Messenger*

v. Robson, cited in *Garland v. Burton*, Andr. 292.

(*s*) *French v. Coxon*, 2 Str. 1081.

(*t*) *R. v. Galle*, Carth. 466; *Garland v. Burton*, 2 Str. 1103.

all penalties, which could not, before the passing of that statute, have been recovered in the inferior courts (*u*). Hence, an informer may bring an action of debt in the courts at Westminster on the 1 Jac. I. c. 22, s. 14, for the recovery of the penalties for selling leather, which has not been searched and sealed; because this statute gives no jurisdiction to the inferior courts to distribute the penalties, but only to inquire of the premises; which inquiry means in their accustomed manner, namely, by indictment or presentment at common law (*x*). This statute applies to those penal statutes only, on which proceedings may be had before the justices of assize, justices of the peace, &c. (*y*).

By the 4th section (of the 21 Jac. I. c. 4) defendants are permitted to plead the general issue, and give the special matter in evidence; and this section, it has been held, applies to subsequent statutes (*z*). By 21 Pl. R. H. T. 1853, the defendant must in such a case insert in the margin of the plea the word "by statute," together with the year or years in which the act or acts he relies on was passed, and also the chapter and section, specifying whether it is a public act or not, "otherwise such plea shall be taken not to have been pleaded by virtue of an act of parliament."

By 18 Eliz. c. 5, s. 1 (made perpetual by 27 Eliz. c. 10), every informer, upon any penal statute, shall sue in proper person, or by his attorney. Hence an infant cannot be a common informer; for he must sue by *prochein amy* or guardian (*a*). By the 3rd section, no informer shall compound with any person that shall offend against any penal statute, for an offence committed, but after answer made in court to the suit, nor after answer, but by order or consent of the court. Leave, however, cannot be obtained at *nisi prius* (*b*). In cases where part of the penalty goes to the crown, leave shall not be given to compound unless notice shall have been given to the proper officer, but in other cases it may. 118 R. G. H. T. 1853. The consent of the crown, however, must be obtained (*c*).

This statute extends to suits by common informers only, and not to those by the party grieved (*d*). It extends, however, as it seems, to subsequent penal statutes, as well as to those which were in being when it was made (*e*). A common informer cannot sue for a less penalty than the statute gives; if he do, though he has a verdict, judgment will be arrested; *e. g.* if a common informer were to sue for the single value of money won at play, the statute (9 Ann. c. 14, s. 2) giving the treble value (*f*).

(*u*) *Morgan v. Lute*, 1 Chitt. 381.

(*x*) *Shipman v. Henbest*, 4 T. R. 109.

(*y*) *Leigh v. Kent*, 3 T. R. 362.

(*z*) *Lord Spencer v. Swannell*, 3 M. & W. 154.

(*a*) *Maggs v. Ellis*, Bull. N. P. 196.

(*b*) 1 Wms. Saund. 312, b, n. (1).

(*c*) *R. v. Gibbs*, 3 Dowl. 345.

(*d*) *Doghead's case*, 2 Leon. 116; 2 Hawk. P. C. (8th ed.) 372. See, also, sect. 6 of the statute.

(*e*) *Williams v. Drewe*, Willes, 392.

(*f*) *Cunningham v. Bennet*, Bull. N. P. 196.

Of the pleadings in Actions founded on Penal Statutes.—The exceptions in the enacting clause of a statute, which creates an offence, must be negatived by the plaintiff in his declaration (*g*), or it would be held bad on demurrer (*h*); but if there be a separate proviso, although in the same section, that need not be negatived in the declaration, but is a matter of defence, and the other party must show it to exempt himself from the penalty (*i*); *a fortiori*, therefore, if the proviso is in a subsequent section (*k*), or in a subsequent statute (*l*). A saving proviso, may, however, it seems, be given in evidence on the general issue; because, if the party is within the proviso, he is not guilty on the body of the act on which the action is founded (*m*).

A recovery in another action for the same offence must be pleaded specially, in order to give the plaintiff an opportunity of replying *nul tiel record*, or that it was a fraudulent recovery (*n*); and in this plea, it should be stated that the plaintiff in the other action had priority of suit; otherwise the plea will be bad on demurrer (*o*). To this plea of a prior recovery, the plaintiff may reply that the recovery was had by covin; and if the covin be found, the plaintiff shall recover, and the defendant shall be imprisoned for two years (*p*). No release of any common person shall be available to discharge a popular action (*q*). The defendant may, it seems, since the Common Law Procedure Act, 1852, s. 81, plead several matters to an action on a penal statute (*r*).

In an action on a penal statute, it was moved by the defendant that the plaintiff should give security to pay the costs, upon affidavit that he was a poor man. But the court refused the motion; for, the statute having given him power to sue, it is a debt due to him; but if it appeared that the action was brought in a feigned name, they would oblige the real prosecutor to give security (*s*). The court will grant a new trial, after verdict for the defendant, in a penal action, *on account of a mistake or misdirection of the judge* (*t*); but it is a settled rule not to grant a new trial in such a case on the ground that the verdict is against evidence (*u*), or, it

(*g*) *Spieries v. Parker*, 1 T. R. 141; *per Alderson, B., Simpson v. Ready*, 12 M. & W. 740.

(*h*) *Gill v. Scrivens*, 7 T. R. 27. After verdict, however, the omitted facts might perhaps be suggested under sect. 143 of the Com. Law Proc. Act, 1852.

(*i*) *Steel v. Smith*, 1 B. & Ald. 94.

(*k*) *Per Erle, J., Van Boven's case*, 9 Q. B. 684.

(*l*) *Pilkington v. Cooke*, 16 M. & W. 615.

(*m*) *Pelly v. Rose*, 12 M. & W. 435. But, *semble*, that this applies only to cases where the proviso in fact amounts to an exception, and should be stated in the declaration; thus practically leaving two

courses open to the defendant, either to demur, or to plead the general issue, and show himself within the exception; for it seems doubtful whether even under the general issue, "by statute," such evidence could be given. *Thibault v. Gibson*, 12 M. & W. 88, and cases *supra*.

(*n*) *Bredon v. Harman*, 2 Str. 701.

(*o*) *Jackson v. Gisling*, Bull. N. P. 197.

(*p*) 4 Hen. VII. c. 20.

(*q*) *Ibid*.

(*r*) See *Heyrick v. Foster*, 4 T. R. 701.

(*s*) *Shinley v. Roberts*, Bull. N. P. 196. And see *Gregory v. Elwidge*, 2 Dowl. 259.

(*t*) *Wilson v. Rastall*, 4 T. R. 753.

(*u*) *Green v. Hall*, 9 Exch. 247.

seems, on any other ground than a misdirection of the judge in point of law (x).

Damages.—It is a general rule that damages cannot be given in a popular action for detention of the debt, no interest attaching in the plaintiff before the recovery thereof; and if judgment be entered for damages as well as the debt, it will be reversed *pro tanto*: or if the costs and damages be incorporated together, the judgment will be reversed as to both (y).

Bribery, &c.—By the 17 & 18 Vict. c. 102 (z), all the previous statutes on the subject of bribery, treating, &c. are repealed. By section 2 of that statute,—

Every person who shall, directly or indirectly, give, lend, or agree to give or lend, or shall offer, promise, or promise to procure, or to endeavour to procure, any money or valuable consideration for any voter, or for any person on behalf of any voter, or for any other person in order to induce any voter to vote, or refrain from voting, or shall corruptly do any such act on account of such voter having voted or refrained from voting at any election (a): or, 2ndly,—who shall, directly or indirectly, give or procure, or agree to give or procure, or offer, promise, or promise to procure or to endeavour to procure any office, place, or employment for any voter, or for any person on behalf of any voter, or for any other person, in order to induce such voter to vote, or refrain from voting, or shall corruptly do any such act on account of any voter having voted or refrained from voting at any election: or,—3rdly,—who shall, directly or indirectly, make any such gift, loan, offer, promise, procurement or agreement to any person, in order to induce such person to procure, or endeavour to procure, the return of any person to serve in Parliament, or the vote of any voter at any election: or,—4thly,—who shall, in consequence of any such gift, loan, &c., procure, or engage or endeavour to procure the return of any person or the vote of any voter: or,—5thly,—who shall advance or pay, or cause to be paid any money to the use of any other person with the intent that such money or any part thereof shall be expended in bribery at any election, or who shall knowingly pay any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any election: shall be guilty of bribery, and shall forfeit 100*l.* to any one who shall sue for the same, with full costs of suit. But the above enactment is not to extend to any money paid for any legal expenses *bond fide* incurred at an election.

(x) *Brook v. Middleton*, 10 East, 268.

(y) *Cuming v. Sibley*, 4 Burr. 2489.

(z) Continued by 21 & 22 Vict. c. 87.
For punishment of candidate guilty of bribery, see 31 & 32 Vict. c. 125.

(a) The receipt of money by a voter

after an election is evidence from which a jury would be justified in inferring an agreement for it previous to the giving of the vote. *Per Lord Campbell, C. J., R. v. Thwaites*, 1 E. & B. 704.

It has been held in the Irish courts that the jury may find for the plaintiff upon the uncorroborated evidence of the plaintiff, although he may have rendered himself liable under the statute (*b*), that the judge is not bound to tell the jury that the defendant is entitled to the benefit of a doubt, by analogy to the practice in criminal cases (*c*).

In *Cooper v. Slade* (*d*), it was held, that a letter which desired a voter to come from H. to C. to vote at the latter place for a particular candidate, and in the postscript of which were these words, "your travelling expenses will be paid," was evidence of bribery within the above section. It appeared that this postscript was added after a discussion in the defendant's committee-room, as to whether travelling expenses were legal or not. The defendant was present at the discussion, and gave his opinion that the payment of travelling expenses was legal, but the postscript was not added by the defendant's own act, or by his direct command. These facts were held to be evidence that the letter was written by his direction and authority. And now by 21 & 22 Vict. c. 87, s. 1, the payment of travelling expenses is declared to be illegal.

By the 9th section the penalties are recoverable only in the superior courts. By the 14th section no person is liable to any penalty under the Act, unless the action is commenced within *one* year after the offence has been committed and the defendant summoned or served with process within that time (unless he has absconded), and any prosecution or suit, &c., must be carried on without any wilful delay (*e*). It is incumbent, therefore, on the plaintiff to show that the action was commenced within that period, either by the record, or in case it does not appear on the face of the record, then by the production of the writ. When in an action under section 14 the plaintiff did not declare for eleven months after the issuing of the writ, it was held that there had been "wilful delay." Such delay cannot be pleaded, but is only ground for an application to the court to stay the proceedings (*f*).

Under an allegation that the *defendant* gave the money, evidence is admissible that the defendant gave the voter a card, which the voter presented to another person, who thereupon gave him money; and it is competent to the plaintiff to prove that the defendant, on the same day and at the same place, gave cards to other persons besides those named in the declaration, in order to establish the defendant's guilty knowledge of the effect the giving of the cards had (*g*).

In a declaration for penalties under this statute, it is now, by 26

(*b*) *McClony v. Wright*, 10 Irish C. L. R. 514.

(*c*) *Magee v. Mark*, 11 Ir. C. L. R. 449.

(*d*) 27 L. J., Q. B. 449.

(*e*) See *Petrie v. White*, 3 T. R. 5.

(*f*) *Taylor v. Vergette*, 7 H. & N. 143; 30 L. J. Ex. 401.

(*g*) *Webb v. Smith*, 4 B. C. N. 373.

Vict. c. 29, s. 6, "in any indictment or information for bribery or undue influence, and in any action or proceeding for any penalty for bribery, treating, or undue influence," sufficient to allege that "the defendant was, at the election at or in connection with which the offence is intended to be alleged to have been committed, guilty of bribery, treating or undue influence, as the case may require." In *Davy v. Baker*, 4 Burr. 2471, a declaration charging that the defendant "received a gift or reward," following the words of the statute, and not specifying the particular kind of reward, was held bad in arrest of judgment (*h*).

(*h*) But the omitted facts might (*semble*) now be suggested under sect. 143 of the

Com. Law Proc. Act, 1852. See *Baker v. Rusht*, 15 Q. B. 870.

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CHAPTER XV.

DECEIT.

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I. *Of the Action of Deceit.*

AN action of deceit may be maintained against any one who deceives by a wilfully false assertion and thereby injures another person, in any contract, who has placed a reasonable confidence in him. And this deceit may be either express or implied; as if a man sell cloth to another, *knowing* it to be badly fulled (a); so if an *innkeeper* sell wine which he *knows* to be corrupt (b). "Is it not true that in every bargain there is a covenant? for if I buy of you a horse, although there be not an express warranty of soundness, yet if the horse be unsound I shall have writ of trespass on my case, and shall aver that you sold me the horse, *knowing* it to be unsound." *Per Paston, J.*, 20 Hen. VI. 35, a. So if a party *knowingly* allows another to enter into a contract with him under a delusion as to material facts which he might have, but does not, remove (c). So if there be any duty imposed by law upon a person to communicate certain facts to one who is negotiating with him (d). So where a sample of goods is fraudulently exhibited to deceive the buyer, whereby the plaintiff is induced to purchase the commodity, which turns out of very inferior quality and value (e). In cases of this kind, however, which are grounded merely on the deceit, it is essentially necessary that the knowledge of the party, or, as it is termed, the *scienter*, should be averred in the declaration, and also proved.

(a) 1 Roll. Abr. 90, (P.) pl. 3.

(b) 9 Hen. VI. 53, b. But in the particular case of vintners, brewers, butchers, and cooks, the selling of unwholesome meat or drink is actionable, it seems, without fraud, if it prejudice anyone, for it is a criminal offence. But see *Burnby v. Bollett*, 16 M. & W. 644;

Emmerton v. Matthews, 31 L. J. Ex. 139.

(c) *Hill v. Gray*, 1 Sta. 434; *Jones v. Keene*, 2 Moo. & Rob. 348.

(d) See *Keates v. Earl of Cadogan*, 10 C. B. 491.

(e) *Per Lord Ellenborough, Meyer v. Everth*, 4 Campb. 22.

1. The scienter must be averred in the declaration :—

For where, in an action of deceit, it was stated in the declaration that the defendant had sold certain goods as his own to the plaintiff, when in truth they were the goods of another person: it was held, that this declaration would not maintain the action, for want of an averment, that the defendant sold the goods *sciens* that they were the goods of another person (*f*). So where the declaration stated that the defendant, being a goldsmith, and having skill in precious stones, sold a stone to the plaintiff for a sum of money, affirming it to be a Bezoar stone, whereas in truth it was not a Bezoar stone: after judgment for the plaintiff, it was adjudged (on error) that the declaration was bad, because it was not averred that the defendant *knew* it not to be a Bezoar stone, or that he warranted it to be a Bezoar stone (*g*).

2. The scienter must be proved :—

In an action on the case, for selling a horse as defendant's own, when in truth it was the horse of A.; it appeared that the defendant bought the horse in Smithfield, but had not taken the usual precaution of having the horse legally tolled; yet as the plaintiff could not prove that the defendant knew that the horse belonged to A. (*h*), the plaintiff was nonsuited; for the scienter or fraud is the gist of the action where there is not a warranty; if there be a warranty, then the party takes upon himself the knowledge of the title to the horse, and also of his qualities (*i*). So where the declaration stated that the plaintiff bargained with the defendant to buy of him a musket, as a sound and perfect musket, for the price of two guineas and a half, and that the defendant, *knowing* the musket to be unsound and imperfect, sold the same to the plaintiff as a sound and perfect musket, &c.: Lord *Kenyon*, C. J., held it to be necessary that the scienter should be proved (*j*).

It is to be observed, that actions for the breach of an express or implied warranty bear a strong resemblance to these actions of deceit: but this distinction between them ought to be attended to; that in actions of deceit, the *gravamen* is the deceit, and the gist of the action is the scienter; but in the action for breach of warranty, the *gravamen* is the breach of warranty; and where the plaintiff declares for such breach, it is not necessary to allege the scienter, nor, if alleged, to prove it (*k*).

(*f*) *Dale's case*, Cro. Eliz. 44.

(*g*) *Chandelor v. Lopus*, Cro. Jac. 4. The principle of this case has been frequently affirmed, but on the facts of it the decision would perhaps now be different, for every affirmation at the time of a sale is a warranty, if so intended, *Power v. Barham*, 4 A. & E. 473, and the declara-

tion might perhaps be held good as an informal one upon a warranty.

(*h*) Or rather that it did not belong to him.

(*i*) *Sprigwell v. Allen*, 2 East, 448, n.

(*j*) *Dowding v. Mortimer*, 2 East, 450, n.

(*k*) *Williamson v. Allison*, 2 East, 446.

II. *Of the Action for Fraudulent Misrepresentation against Persons not Parties to the Contract (l).*

Where a person, with a design to deceive and defraud another, makes a false representation of a matter inquired of him (or volunteers the false information, as in the case of the prospectus of a joint-stock company, issued to the public (*m*),) in consequence of which the person to whom the representation is made enters into a contract, and thereby sustains an injury, an action of deceit will lie at the suit of the party injured, against the party making the fraudulent misrepresentation, although such party be a stranger to the contract, from the entering into which the plaintiff was damaged (*n*). This was for the first time decided in the case of *Pasley v. Freeman*, 3 T. R. 51, which came before the court on a motion in arrest of judgment. The declaration stated, "that the defendant, intending to defraud the plaintiffs, persuaded them to deliver certain goods to one F. upon credit, and for that purpose falsely and fraudulently asserted that F. was a person safely to be trusted, &c., whereas, in truth, F. was not a person safely to be trusted, and the defendant well knew the same, &c." The question was, whether the action could be maintained, and the court, *Grose, J., diss.*, was of opinion that it might.

The principle of this case was confirmed and somewhat extended, by the case of *Langridge v. Levy* (*o*), which was an action for falsely and fraudulently warranting a gun to have been made by Nock, and selling it as such to the plaintiff's father for the use of himself and sons, one of whom, the plaintiff, confiding in the warranty, used the gun, which burst and injured him; *Parke, B.*, in delivering the judgment of the Court of Exchequer, said,—“As there is fraud, and damage the result of that fraud, not from an act remote and consequential, but one contemplated by the defendant at the time as one of its results, the party guilty of the fraud is responsible to the party injured” (*p*). In that case, said Lord Abinger, C. B., in *Winterbottom v. Wright*, 10 M. & W. 114,—“the gun was bought for the use of the son, the plaintiff in

(l) “It is a very old principle of equity, that, if a representation be made to another person going to deal in a matter of interest upon the faith of that representation, the former shall make that representation good, if he knows it to be false.” *Per Lord Eldon*, 6 Ves. 182. *Acc. Hutton v. Rossiter*, 7 De G. M. & G. 18; and see *per Cottenham, C., Blair v. Bromley*, 2 Phill. 360.

(m) *Gerhard v. Bates*, 2 E. & B. 476; *Clarke v. Dixon*, 6 C. B. (N. S.) 453; 28 L. J., C. B. 225.

(n) The old cases were confined to fraudulent assertions by one of the con-

tracting parties, as was observed by *Grose, J.*, in *Pasley v. Freeman*, and proceeded upon the breach of a promise, either express or implied, that the fact misrepresented was true, and in these respects they differ from that case and the subsequent cases decided on the authority of it. See *per Lord Eldon*, 3 V. & B. 110.

(o) 2 M. & W. 519; (on error) 4 M. & W. 337.

(p) That in such a case no action would lie upon the warranty alone, and in the absence of fraud, see *Longmeid v. Holiday*, 6 Exch. 761.

that action, who could not make the bargain himself, but was really and substantially the party contracting:" and *per Alderson, B.*,—"The principle of that case was simply this, that the father having bought the gun for the very purpose of being used by the plaintiff, the defendant made representations by which he was induced to use it. There a distinct fraud was committed on the plaintiff; the falsehood of the representation was also alleged to have been within the knowledge of the defendant who made it, and he was properly held liable for the consequences." "The ground of the decision in *Langridge v. Levy*, was that the false representation was made by the defendant with a view that it should be acted upon in the manner that occasioned the injury"(g). So a false report by managers addressed to shareholders in order to influence the market value of shares, renders them liable to actions at the suit of persons induced thereby to become shareholders (r). When directors in discharge of their duty of making reports, fraudulently, for the purpose of misleading others, represent the company to be in a different state to which they know it to be, and the persons to whom it is addressed act upon it, that is a misrepresentation of the company (s). So where the defendant, being about to sell a public house, falsely represented to B., who had agreed to purchase it, that the receipts were 180*l.* a month, B. having to the knowledge of the defendant communicated this statement to the plaintiff, who became the purchaser instead of B.; it was held, that an action was maintainable for the deceit by the party eventually injured (t).

In cases of this kind it is not necessary that the defendant should have derived any advantage from the deceit; or that he should have colluded with the person who did derive the advantage (u); but there must be fraud in the defendant, in order to support the action (x): for in a case where there was not any fraud or deceit in the party making the representation, although he had incautiously asserted that to be within his own knowledge, which in strictness he could not be said to have known, but had reasonable and probable cause only to believe (y), *viz.* the solvency of a certain person; it was held (*diss. Kenyon, C. J.*) that the action was not maintainable (z).

"Fraud may consist as well in the suppression of what is true as in the representation of what is false." *Per Chambre, J.*, 3 B. & P. 371. The defendant having had a credit lodged with him by a foreign house, in favour of one T. to a certain amount, upon an

(g) *Per Wood, V.-C.*, *Barry v. Crosskey*, 2 J. & H. 1.

(r) *Scott v. Dixon*, Q. B., cited 29 L. J., Ex. 62; *Bedford v. Bagshaw*, 4 H. & N. 538.

(s) *National Exchange Company v. Drew*, 2 Macqueen, H. of L. Cases, 125,

per Lord Cranworth.

(t) *Pilmore v. Hood*, 5 B. N. C. 97.

(u) *Pasley v. Freeman*, 3 T. R. 51.

(x) *Tapp v. Lee*, 3 B. & P. 367.

(y) This is necessary; *Shrewsbury v. Blount*, 2 M. & G. 475.

(z) *Haycraft v. Cressy*, 2 East, 92.

express stipulation, that there should be previously lodged in the defendant's hands goods to treble the amount, and having been applied to, by the plaintiffs, for information respecting the responsibility of T., answered, that he (defendant) did not know anything of T., except what he had learned from his correspondent, but that he had a credit lodged with him to a certain amount by a respectable house, which he held at the disposal of T., (omitting to mention the stipulation on which the foreign house had given T. credit,) and that, upon a view of all the circumstances which had come to the defendant's knowledge, the plaintiffs might execute T.'s order, *viz.* for the sale and delivery of goods upon credit, with safety. It was held, that there was a material suppression of the truth by the defendant, and evidence sufficient for the jury to find fraud, which was the gist of the action; although at the time when the defendant made the representation, he added, that he gave the advice without prejudice to himself (a). It is not necessary for the plaintiff to show that the false statement of the defendant was accompanied with an intention to injure the plaintiff (b).

The plaintiff being about to furnish the defendant's son with goods on credit, inquired of the defendant whether his son had, as he asserted, 300*l.* of his own property; the defendant answered that his son's statement was "perfectly correct," as he "advanced" him the money; the fact being, that the defendant had *lent* his son 300*l.* on his promissory note. The son having afterwards become insolvent, it was held, that this was a misrepresentation for which the defendant was liable in damages; for, the statement being false within the defendant's knowledge, fraud might be inferred (c).

Where a bill was presented for acceptance at the office of the drawee, when he was absent, and A., who lived in the same house with the drawee, being assured by one of the payees that the bill was perfectly regular, was induced to write on the bill an acceptance as by the procuration of the drawee, believing that the acceptance would be sanctioned, and the bill paid by the drawee; but the bill was dishonoured when due: the indorsee, having sued the drawee, was nonsuited on the above facts. The indorsee then brought an action against A. for falsely and fraudulently representing that he was authorized to accept by procuration; and although the jury negatived fraud in fact, yet it was held, that A. was liable, for there was a fraud in law (d). In the foregoing case, there was a direct assertion of that which the defendants knew to be untrue; but, in order to constitute fraud for which this action will lie, it is not necessary to show that the defendants knew the fact they stated to be untrue; it is enough that the fact *is* untrue,

(a) *Eyre v. Dunsford*, 1 East, 318.
(b) *Foster v. Charles*, 7 Bingh. 105.

(c) *Corbett v. Brown*, 8 Bingh. 33.
(d) *Polhill v. Walter*, 3 B. & Ad. 114.

if they communicated that fact for a deceitful purpose (e); and had (*semble*) no reasonable or well-grounded belief of its truth (f).

But where the party making the representation does not know it to be untrue, and there is no fraud in fact, the action cannot be maintained (g). Fraud in law consists in knowingly asserting that which is false in fact to the injury of another (h). Confusion seems to have arisen from not distinguishing between what is fraud in law, and the motives for actual fraud. It is a fraud in law if a party makes representations which he knows to be false, and injury ensues. Although the motives from which the representation proceeded may not have been bad, the person who makes such representation is responsible for the consequences (i). Thus, in *Polhill v. Walter*, fraud in fact was negatived. If a representation be untrue in fact, and not believed to be true by the party making it, and made for a fraudulent purpose, it is both a legal and a moral fraud (j). "It is settled law that, independently of duty, no action will lie for a misrepresentation unless the party making it *knows* it to be untrue, and makes it with a fraudulent intention to induce another to act on the faith of it, and to alter his position to his damage" (k).

In a recent case before Vice-Chancellor Wood, he said that the principles by which, in the administration of justice, the limits of responsibility for the consequences of a false representation are to be ascertained are these: First, every man must be held responsible for the consequences of a false representation made by him to another (l) upon which that other acts, and so acting is injured or damnified. Second, every man must be held responsible for the consequences of a false representation made by him to another upon which a third person acts and so acting is injured or damnified; provided it appear that such false representation was made with the direct intent that it should be acted on by such third person in the manner that occasions the injury or loss. Third, but to bring it within the second principle the injury must be immediate, and not the remote consequence of the representation thus made (m).

In the case of *Udell v. Atherton* (n), the question was whether a principal who has had the benefit of a contract made by his agent is responsible for a deliberate fraud committed by the latter in the making of the contract, by which fraud alone

(e) *Taylor v. Ashton*, 11 M. & W. 414.

(f) *Shrewsbury v. Blount*, 2 M. & G. 475.

(g) *Freeman v. Baker*, 5 B. & Ad. 797; *Ormerod v. Huth*, 14 M. & W. 65.

(h) *Per Cresswell, J., Crawshaw v. Thompson*, 4 M. & Gr. 387.

(i) *Per Tindal, C. J., Foster v. Charles*, 6 Bing. 396.

(j) *Taylor v. Ashton*, 11 M. & W. 401.

(k) *Per Parke, B., Thorn v. Bigland*, 8 Exch. 731.

(l) It is presumed that this means a representation that he knows to be false, or at any rate does not believe to be true.

(m) *Barry v. Croskey*, 2 J. & H. 1.

(n) 7 H. & N. 172.

the contract was obtained, the principal having neither authorized nor known of the fraud of the agent. The Court of Exchequer were equally divided upon the question, *Pollock*, C. B., and *Wilde*, B., being of opinion that he was liable in an action of deceit, *Martin* and *Bramwell*, BB., that he was not, although the contract might have been avoided so long as it was executory. *Wilde*, B., based his judgment on the ground that the principal having adopted the sale made by the agent, and received the price, was responsible for the fraud committed by the agent in making the contract. In an action against a bank for the fraud of their manager, *Willes*, J., in delivering the judgment of the Exchequer Chamber, approved of *Wilde*, B.'s, judgment in *Udell v. Atherton*, and said, that no sensible distinction could be drawn between the case of fraud and any other wrong, as to which the general rule is that the master is answerable for such wrong if committed in the course of his service and for his benefit; that although he has not authorized the particular act, yet, as he has put his agent in his place as to a class of acts, he must be answerable for the manner in which the agent conducts himself in doing his business (o).

By 9 Geo. IV. c. 14, s. 6,—“No action shall be brought whereby to charge any person upon or by reason of any representation or assurance made or given, concerning or relating to the character, conduct, credit, *ability*, trade, or dealings of *any other person*, to the intent or purpose that such other person may obtain credit, money, or goods upon (*sic*), unless such representation or assurance be made in writing, signed by the party to be charged therewith” —This provision was framed to prevent an evasion of the Statute of Frauds, 29 Car. II. c. 3, s. 4, which had prevailed since the decision in *Pasley v. Freeman*, *ante*, p. 559. Parties who were thereby prevented from suing as upon “a special promise to answer for the debt, default, or miscarriage of another person,” because there was not any guarantee in writing, brought actions on the misrepresentation. But this provision is not confined to cases under the Statute of Frauds, which is not mentioned in the act till afterwards (p). A representation made by the defendant alone, who was in partnership with two other persons, that the *firm* was trustworthy, is a representation as to the credit of others within the meaning of the statute, and must be in writing, to make it binding (q).

In *Lyde v. Barnard*, 1 M. & W. 101, the foregoing section of the 9 Geo. IV. c. 14, was very fully discussed. It was an action for falsely representing that the life interest of Lord E. T. in certain trust funds was charged with only three annuities, whereby the plaintiff was induced to advance to the said Lord E. T. 999*l.*,

(o) *Barwick v. The English Joint Stock Bank*, 36 L. J., Ex. 149; L. R. 2, Ex. 259.

(p) *Per Tindal*, C. J., *Devaux v. Steinkeller*, 6 B. N. C. 88.

(q) *Devaux v. Steinkeller*, 6 B. N. C. 84.

for the purchase of an annuity secured by his covenant, &c., and also by an assignment of his life interest in the said fund; whereas the defendant well knew that the said interest was charged, not only with three annuities, but also with a mortgage for 20,000*l*. The representation having been made by parol, Lord *Abinger*, C. B., at the trial, nonsuited the plaintiff, on the ground that the case was within the statute. On motion for a new trial, the court was equally divided: Lord *Abinger* and *Gurney*, B., conceiving the case to be within the statute, relying on the word "ability" therein; *Parke*, B., and *Alderson*, B., considering the case not within the statute, on the ground that the representation was directed not to the general "ability" of Lord E. T., but to the facts connected with a specific security, and were quite irrespective of his general solvency or otherwise. A representation that money might safely be lent to A., because the title deeds of an estate which A. had just bought were in the defendant's possession, and that nothing could be done without the defendant's knowledge, was held to be a representation as to the ability of A. within the statute (*r*).

An action will lie under the above section for a false representation *in writing*, although the plaintiff might have been partly influenced by subsequent *oral* representations of the defendant, if the jury are satisfied that the plaintiff was substantially induced by the written representation to give the credit (*s*). Evidence that the representation was not in writing, signed, &c., is admissible under the general issue (*t*).

In ordinary cases, the person who makes a representation of the credit of a third person is not liable beyond the value of the goods then furnished on the faith of the representation (*u*): but circumstances may exist which will render him liable for losses arising from subsequent dealings within a reasonable time; as where A. made an inquiry of B. as to the circumstances of C. with respect to opening an account with him as a *general customer* (*v*).

Although there is no exclusive ownership of the symbols which constitute a trade mark apart from their application to a vendible commodity, yet the exclusive right to make such application is a property for the invasion of which a remedy is given at law by an action in the nature of deceit (*x*).

(*r*) *Swan v. Phillips*, 8 A. & E. 457.

(*s*) *Taiton v. Wade*, 18 C. B. 371.

(*t*) *Turnley v. M'Gregor*, 6 M. & G. 46.

(*u*) *De Graves v. Smith*, 2 Campb. 533.

(*v*) *Hutchinson v. Bell*, 1 Taunt. 558.

(*x*) *The Leather Cloth Company v. The American Leather Cloth Company*, 33 L.

J., 199 Chanc. See *McAndrew v. Bassett*, 33 L. J., 568 Chanc. The Merchandise Marks Act, 1862 (25 & 26 Vict. c. 88), by s. 11 enacts, that a conviction under that act is not to affect any civil remedy.

III. Of Warranty.

Express.—"By the civil law every person is bound to warrant a thing that he sells or conveys, although there be no express warranty: but the common law binds him not, unless there be a warranty, either in deed (express) or in law (implied); for, *caveat emptor*." 1 Inst. 102, a.

In an action by a shipowner against a charterer for not loading an agreed cargo, the defence being the failure of the performance of a condition precedent, the following propositions were laid down by *Vaughan Williams, J.*, in delivering the judgment of the Exchequer Chamber:—1. In policies of insurance and charterparties, the word "warranty" is synonymous with condition. 2. A "representation" is a statement or assertion made by one party to the other before or at the time of a contract of some matter or circumstance relating to it. 3. Although a representation is sometimes contained in the written instrument, it is not an integral part of the contract; and consequently the contract is not broken, though the representation proves to be untrue; nor (with the exception of the case of policies of insurance, at all events marine policies which stand on a peculiar anomalous footing) is such untruth any cause of action, nor has it any efficacy whatever, unless the representation was made fraudulently, either by reason of its being made with a knowledge of its untruth, or by reason of its being made dishonestly with a reckless ignorance whether it was true or untrue. 4. If the Court should determine that the descriptive statement in a written instrument is *a substantive part of the contract*, and not a mere representation, the question arises whether that part of the contract is a condition precedent, or only an independent agreement, a breach of which will not justify a repudiation of the contract, but will only be a cause of action for compensation in damages. 5. The true doctrine is that, generally speaking, if the descriptive statement *was intended to be a substantive part of the contract*, it is to be regarded as a warranty, that is to say, a condition on the failure or non-performance of which the other party may, if he be so minded, repudiate the contract *in toto*, and so be relieved from performing his part of it, provided it has not been partially executed in his favour. If, indeed, he has received the whole or any substantial part of the consideration for the promise on his part, the warranty loses the character of a condition, or to speak perhaps more properly, ceases to be available as a condition, and becomes a warranty in the narrower sense of the word, *viz.*, a stipulation by way of agreement for the breach of which a compensation must be sought for in damages (*y*).

Where a party in possession of a personal chattel sells it, and at the time of sale affirms it to be his own, when in truth it belongs

to another, the vendee may recover a compensation in damages for such injury as he can prove that he has sustained in consequence of this affirmation being false; for the possession of a personal chattel is a colour of title, and it is but a reasonable confidence which the vendee places in the vendor, when he affirms it to be his own (z). So where the defendant, having goods in his possession, represented to the plaintiff, an auctioneer, that he was entitled to dispose of them, in consequence of which the plaintiff, at his request, sold them by auction, and paid over the proceeds to the defendant, and the true owner subsequently recovered their value against the plaintiff; it was held, that there being an express warranty of title, the plaintiff might recover against the defendant on an implied contract of indemnity (a).

But where the affirmation is (as it is termed in some of the books) a nude assertion, that is, where the party deceived may exercise his own judgment; as where it is mere matter of opinion, or where he may make inquiry into the truth of the assertion, and it becomes his own fault from laches, that he is deceived; in this case an action cannot be maintained (b). As if A., being possessed of a term for years, offers to sell it to B., saying that a stranger would have given him a certain sum of money for the term, whereas, in truth, that sum had not been offered to him, an action will not lie, although B. was, by such affirmation, deceived in the value (c). So, an action of deceit cannot be maintained by the seller of his share in a trade, against the buyer, who has persuaded him to sell it, at a certain price, by a representation that certain partners, whose names he will not disclose, are to be joint purchasers, and that they will give no more; although in truth they had authorized the defendant to purchase it, doing the best he could, and although the defendant charged them with a higher price than he gave (d).

It is said that a *general* warranty will not extend to guard against defects that are plainly and obviously the objects of one's senses, as if a horse be warranted perfect, and want either a tail or an ear (e), but it is conceived that this is a rule of evidence, and not of law. It would, of course, be very strong evidence that the warranty being general in terms, was not intended by the parties to cover a defect that must have been obvious to the purchaser if he had used his eyes. But the purchaser might prefer to rely on the warranty of the seller, rather than his own observation. If

(z) *Crosse v. Gardner*, Carth. 90. See *Sims v. Murryat*, 17 Q. B. 281. It was usual formerly, in cases of this kind, to declare in tort for the deceit; *per Tindal*, C. J., *Margetson v. Wright*, 7 Bingh. 605; but assumpsit is now the commoner form, see *post*, p. 578. *Shepherd v. Pybus*, 3 M. & G. 868.

(a) *Adamson v. Jarvis*, 4 Bingh. 66.

See *per Tindal*, C. J., *Rawlings v. Bell*, 1 C. B. 959.

(b) *Bayly v. Merrel*, Cro. Jac. 386.

(c) 1 Roll. Abr. 101, Pl. 16.

(d) *Vernon v. Keyes*, 4 Taunt. 488; Ex. Ch.

(e) Blackstone, vol. 3, p. 165. *Bayly v. Merrel*, Cro. Jac. 367. See *Margetson v. Wright*, 7 Bingh. 605.

this were so, the sale of a horse, sound and free from all blemish, might be broken by a patent defect. In accordance with this was the case of *Butterfield v. Burroughes* (*f*), which was on a warranty of a horse to be sound. Breach, want of an eye. The jury having found for the plaintiff, it was moved in arrest of judgment that the want of an eye is a visible thing, whereas the warranty only extended to secret infirmities. To this it was answered and resolved, that the warranty might have extended to this defect, and must be intended to have done so, since the jury had found that the defendant did warrant. When the action is for the deceit, the fact of the defect being apparent would of course be very cogent, but not conclusive evidence that the purchaser was not deceived by the misrepresentation. There would in such a case be no cause of action unless the representation was made in such a manner as to induce the purchaser to forbear examining the article purchased, and it would seem to be a question for the jury whether he was actually led to make the purchase by the device of the seller (*g*).

If a ship is sold *with all faults*, the seller is not liable to an action in respect of latent defects which he knew of without disclosing at the time of sale, unless he used some artifice to disguise them, and prevent their being discovered by the purchaser (*h*). But such a proviso must be understood to refer to such faults as a vessel may have consistently with its being the thing described. Where, therefore, a ship was sold as a *copper-fastened* vessel, "to be taken with all faults," it was held to apply only to such faults as "a copper-fastened vessel" might have, and therefore that if it was not a copper-fastened vessel the warranty was broken (*i*).

Upon a sale of pictures, a bill of parcels of "Four Pictures, Views in Venice, Canaletti, 160*l*," is evidence from which a jury is at liberty to infer a warranty, that the pictures were painted by that artist (*k*).

On a sale of goods, if the sale-note do not contain a stipulation that the goods are equal to a sample, parol evidence is inadmissible to make such stipulation part of the contract (*l*). So if, before or at the time of the sale, a sample of the goods has been exhibited to the buyer, but the written contract or the sale-note merely describes the goods as of a particular denomination, this is not a sale by the sample (*m*). So if a representation be made before a sale, of the quality of the thing sold, with full opportunity for the purchaser to inspect and examine the truth of the representation, and a contract of sale be afterwards reduced into writing in which that representation is not embodied, no action lies against the vendor on the

(*f*) Salk. 211.

(*g*) *Per* Lord Ellenborough, C. J., in *Vernon v. Keyes*, 12 East, 637.

(*h*) *Baglehole v. Walters*, 3 Camp. 154; *Taylor v. Bullen*, 5 Exch. 779.

(*i*) *Shepherd v. Kain*, 5 B. & Ald. 240.

(*k*) *Power v. Barham*, 4 A. & E. 473.

(*l*) *Meyer v. Everth*, 4 Campb. 22.

(*m*) *Gardiner v. Gray*, 4 Campb. 144, *post*.

ground that the article sold is not answerable to that representation, whether the vendor knew of the defects or not (*n*). But, where the warranty is implied by law, evidence of its breach is admissible, although there is a written contract (*o*). And where the defendant gave the plaintiff a verbal warranty, and subsequently, upon payment of the price, a receipt, as follows, "bought of G. P. a horse, for the sum of 7*l.* 2*s.* 6*d.*;" it was held, that this was a mere memorandum, and not intended by the parties to contain the terms of the contract, and, therefore, that evidence of the verbal warranty might be given (*p*).

Upon a treaty for the sale of hops, by sample, the seller assured the purchaser that sulphur had not been used in their growth, and thereupon a contract of sale was entered into. After the hops had been inspected, weighed, and delivered, the buyer discovered that sulphur had been used. The jury having found that the representation had been made, and was false (but without fraud), and that the buyer had entered into the contract entirely on the faith of that representation, it was held that the contract was conditional on sulphur not having been used, and that as sulphur had been used, the defendant was at liberty to reject the hops as soon as he discovered it, although they corresponded with the sample (*q*).

Where there is a particular express warranty, such warranty is not to be extended by implication (*r*). An action will lie for a breach of warranty, though the purchaser has not paid for the article bought (*s*).

Of the Warranty of Horses.—As actions are more frequently brought for the breach of warranties upon the sale of horses than upon the sale of any other chattel, the following remarks will be chiefly directed to that subject:—A horse being an animal subject to secret maladies, which cannot be discovered by a mere trial and inspection, it is usual, and in all cases prudent, for the buyer of a horse to require from the seller a warranty of its soundness: for if a horse, having a secret malady, is sold without a warranty of soundness, and without any fraud on the part of the seller, the purchaser is without a remedy. Formerly, indeed, it was a current opinion, that a sound price given for a horse was tantamount to a warranty of soundness; but it was observed by *Grose, J.* (*t*), that when that doctrine came to be sifted, it was found to be so loose and unsatisfactory a ground of decision, that Lord *Mansfield, C. J.*, rejected it, and said, that there must either be an express warranty of soundness, or fraud in the seller, in order to maintain the action.

(*n*) *Pickering v. Dowson*, 4 Taunt. 779.

(*o*) *Shepherd v. Pybus*, 3 M. & G. 868.

(*p*) *Allen v. Pink*, 4 M. & W. 140.

See *per Parke, B.*, 2 Exch. 97.

(*q*) *Bannerman v. White*, 10 C. B.

(N. S.) 844; 31 L. J., C. P. 29.

(*r*) *Dickson v. Zizania*, 10 C. B. 602; but see further, p. 575.

(*s*) Bro. Abr. Deceit, pl. 34.

(*t*) *Parkinson v. Lee*, 2 East, 322.

The advantage arising to the buyer, from an express warranty of soundness, is this—that such warranty extends to every kind of soundness, known and unknown to the seller; and if the warranty be false, the buyer has a remedy against the seller, to recover a compensation in damages.

“To be sold, a black gelding, five years old; has been constantly driven in the plough—warranted;” it was held, that the warranty applied to soundness only (*u*). “Received of B. £ for a grey four-year old colt, warranted sound;” it was held, that the warranty was confined to soundness only, and that the preceding statement, as to the age, was matter of description only, for which the party was not answerable, unless it were shown to be false within his knowledge (*v*).

A horse was sold at a public auction, warranted six years old and sound, and one of the conditions of sale (*w*) was, “that the purchaser of any horse warranted sound, who should conceive the same to be unsound, should return him within two days; otherwise he should be deemed sound.” Ten days after the sale, the plaintiff discovered that the horse was twelve years old, and offered to return him, but the defendant refused to receive him, and thereupon the plaintiff sold the horse, and brought an action on the warranty against the seller. It was held, that the action might be maintained; Lord *Kenyon*, C. J., observing, “that the question turned on the condition of sale, which, in his opinion, ought to be confined solely to the circumstance of unsoundness; that there was good sense in making such a condition at a public sale; because, notwithstanding all the care that could be taken, many accidents might happen to the horse between the time of sale and the time when the horse might be returned, if no time were limited. But the circumstance of the age of the horse was not open to the same difficulty” (*x*).

The rule as to unsoundness is, that if at the time of the sale the horse has any disease, which either actually does diminish the natural usefulness of the animal, so as to make him less capable of work of any description, or which in its ordinary progress will diminish the natural usefulness of the animal; or if the horse has, either from disease or accident (whether such disease be congenital or arises subsequently to its birth (*y*)), undergone any alteration of

(*u*) *Richardson v. Brown*, 1 Bingh. 344.

(*v*) *Budd v. Fairmaner*, 8 Bingh. 48.

(*w*) In *Mesnard v. Aldridge*, 3 Esp. 271, where the conditions of sale were contained in a printed paper pasted up under the auctioneer's box, and the auctioneer at the time of the sale announced that the conditions of sale were as usual, Lord *Kenyon*, C. J., held, that this was a sufficient notice to all persons who came to the sale, of the conditions under which

the horses were sold. *Acc. Bywater v. Richardson*, 1 A. & E. 508; where the conditions of sale were not particularly referred to. Such a defence must be pleaded, and is not evidence under the general issue. *Smart v. Hyde*, 8 M. & W. 723.

(*x*) *Buchanan v. Parnshaw*, 2 T. R. 745.

(*y*) *Holyday v. Morgan*, 28 L. J., Q. B. 9.

structure, that either actually does at the time, or in its ordinary effects will, diminish the natural usefulness of the horse, such horse is unsound. *Per Parke, B. (z).*

Roaring is a malady which renders a horse less serviceable for a permanency, and therefore an unsoundness (*a*). But, it seems, it is not sufficient to show that a horse emits a loud sound in breathing, for that may be a bad habit merely; the noise must be shown to proceed from some disease or organic defect, which makes the horse incapable of performing the usual functions of a horse (*b*). A *nerved* horse is unsound (*c*); so is a chest-foundered (*d*). So if the horse has a bone spavin in the hock (*e*). Crib-biting, which has not yet produced disease, or alteration of structure, is not an unsoundness within a general warrant (*f*): but it is a vice under a warranty that a horse is sound and free from vice (*g*). Mere badness of shape (*h*), though rendering the horse incapable of work, or more liable to become lame at some future time, *e.g.* "curby hocks" (*i*), is not unsoundness. But a warranty of soundness is broken by a malformation existing from the birth, which at the time of the sale renders the horse less fit for reasonable use; as an extraordinary convexity of the cornea of the eye, producing short-sightedness, in consequence of which the horse is liable to shy (*k*). A temporary lameness rendering a horse less fit for present service at the time of sale, is a breach of a warranty of soundness; and it will be no defence that he afterwards recovered (*l*). So if a horse has at the time of sale a cough, although that may be either temporary or prove mortal, he is unsound (*m*); for a man who buys a horse warranted sound, must be taken as buying him for immediate use, and has a right to expect one capable of that use, and of being immediately put to any fair work the owner chooses (*n*). But as the purchaser is not entitled to return the horse on the breach of warranty (see *post*, p. 576), temporary maladies producing no permanent deterioration of the animal, would give, generally speaking, a right to damages merely nominal. Some splints cause lameness, others do not, and the consequences of the splint are not apparent at the time, like the loss of an eye, or any visible blemish or defect, to a common observer. In an action upon a warranty, in which the defendant

(*z*) *Coates v. Stephens*, 2 M. & Rob. 157.
(*a*) *Onslow v. Eames*, 2 Stark. N. P. C. 81.

(*b*) *Bassett v. Collis*, 2 Campb. 523.
(*c*) *Best v. Osborne*, R. & Mo. 290.
(*d*) *Atterbury v. Fairmaner*, 8 Moore,

32.
(*e*) *Watson v. Denton*, 7 C. & P. 85.
(*f*) *Broennenburg v. Haycock*, Holt,

630.
(*g*) *Scholefield v. Robb*, 2 M. & Rob.

210.
(*h*) *Dickinson v. Follett*, 1 M. & Rob.

299.

(*i*) *Brown v. Elkington*, 8 M. & W. 132.

(*k*) *Holliday v. Morgan*, 1 E. & E. 1.

(*l*) *Elton v. Brogden*, 4 Campb. 281.

(*m*) *Elton v. Brogden*: *Liddard v. Kain*, 9 Moore, 356; *Coates v. Stevens*; but see *Bolden v. Brogden*, 2 M. & Rob. 113.

(*n*) *Per Parke, B.*, in *Coates v. Stevens*, 2 M. & Rob. 157; *Kiddell v. Burnard*, 9 M. & W. 668.

warranted the horse to be sound, wind and limb, "at this time;" that is, at the time of the warranty made: the jury found a verdict for the plaintiff. The judge requested the jury to tell him, whether the horse was sound; or, if they believed him to be unsound, whether that unsoundness arose from the splint, the existence of which was known to the plaintiff at the time of the sale. The jury, in answer, said, that although the horse exhibited no symptoms of lameness at the time when the contract was made, he had then upon him the seeds of unsoundness arising from the splint. The court, on motion for a new trial, sustained the verdict, thinking that, by the terms of the warranty, the parties meant that this was not a splint at that time which would be the cause of future lameness, and that the jury had found that it was; and consequently that the warranty was broken (o).

A horse dealer cannot maintain an action upon a contract for the sale and warranty of a horse, made by him upon a Sunday (p). But a person who makes such a contract, not in the exercise of his "ordinary calling," may (q). The defendant was the proprietor of a stage-coach, and a horse-dealer. The plaintiff's son was travelling on a Sunday in the defendant's coach, and then made a verbal bargain for a horse at a price exceeding 10*l.*, the defendant warranting him to be sound. The horse was delivered to the plaintiff on the following Tuesday, and the price then paid; there was no evidence to show that the plaintiff or his son knew at the time when he made the bargain that defendant was a horse-dealer. An action having been brought for a breach of the warranty; it was objected, that the bargain having been made on a Sunday, was void within the 29 Car. II. c. 7, s. 1. But it was held that there was not any complete contract on the Sunday, as it then rested in parol, nor until the Tuesday when the horse was delivered to and accepted by the plaintiff. But, assuming the contract to be complete on the Sunday, as the purchaser had no knowledge of the fact that the vendor was exercising his ordinary calling, he might recover (r).

Where a horse is sold with a warranty of soundness for a certain sum, part of which is paid at the time of sale, if the horse prove unsound, and the sum paid be equal to the value of the horse, the seller cannot recover the remainder (s). Plaintiff sold the defendant a horse with a warranty of soundness; the defendant gave the plaintiff a bill of exchange for the price: the defendant discovering the horse to be unsound, tendered him to the plaintiff, but he refused to take him back again. An action having been brought by the plaintiff against the defendant on the bill, the defendant

(o) *Margetson v. Wright*, 8 Bingh. 454.

(p) *Fennell v. Ridley*, 5 B. & C. 406.

(q) *Drury v. Defontaine*, 1 Taunt. 131.

But see *Smith v. Sparrow*, 4 Bingh. 84.

(r) *Bloxsome v. Williams*, 3 B. & C. 232.

(s) *King v. Boston*, 7 East, 481, n.

proved that the plaintiff, *at the time of sale, knew that the horse was unsound*. It was held, that the plaintiff could not recover; for it was clearly a fraud, and a person cannot recover the price of goods sold under a fraud (t).

Where the contract of warranty is still open, it is essentially necessary that the plaintiff should declare on the warranty, and not merely for money had and received, to recover the price of the horse (u). In an action for money had and received to recover back the price of a horse, sold as a sound horse, and which proved to be unsound, it appeared in evidence, that there had been a warranty of soundness at the time of the original contract of sale; but in a subsequent conversation, when the plaintiff objected that the horse was unsound, the defendant said, that if the horse were unsound he would take it again, and return the money. It was held that the action for money had and received would not lie; because this was no other than a mode of trying the warranty, which could be by a special action on the case only; Lord *Ellenborough*, C. J., observing, "that the subsequent conversation was not to be considered as an abandonment of the original warranty, which the defendant still insisted had been performed; but rather as a declaration, that, if the warranty were shown to be broken, he would do that which is usually done in such cases, take back the horse and repay the money. Then, where any question on the warranty remains to be discussed, it ought to be so in a shape to give the other party notice of it, namely, in an action on the warranty" (x).

A warranty by one not intrusted to sell, but merely to deliver the article, and bring back the price, is not even *prima facie* evidence to bind the principal (y). The servant of a private owner entrusted on one particular occasion, not at a fair or other public mart, to *sell and deliver* a horse, is not therefore by law authorized to bind his master by a warranty. The buyer, therefore, taking such a warranty, takes it at the risk of being able to prove that the servant had in fact his master's authority for giving it. Upon the master refusing to abide by the servant's unauthorized warranty, the buyer may, however, repudiate the purchase (z). But there is a distinction between the case of the servant of a private owner and that of a servant of a horse-dealer; and in the case of the latter giving an unauthorized warranty, the master would be bound thereby (a). It would seem that in the case of a sale by

(t) *Lewis v. Cosgrave*, 2 Taunt. 2.

(u) *Weston v. Downes*, Doug. 23.

(x) *Payne v. Whale*, 7 East, 274.

(y) *Woodin v. Burford*, 2 Cr. & M. 392; *Fairmaner v. Budd*, 7 Bingh. 574.

(z) *Brady v. Todd*, 9 C. B. (N. S.)

592; 30 L. J., 223 C. P. This overrules *Helyear v. Hawke*, 5 Esp. 72.

(a) *Fenn v. Harrison*, 3 T. R. 757; *Bank of Scotland v. Anderson*, 1 Dow., P. C. 40.

the servant of a private owner, at a fair or a public mart, the law would in like manner imply an authority to warrant (b).

It is usual to insert the warranty in the receipt for the price of the horse; in such case, the receipt, if duly stamped with a receipt stamp, will be evidence of the warranty. It does not require an agreement stamp (c). And if, on the face of such receipt, it appear that *money* was the consideration paid for the horse, it will not be competent to the defendant to prove a different consideration, in order to take advantage of a variance (d). So where the declaration stated (in substance) the sale of a horse warranted sound, by the defendant to the plaintiff for 31*l.*, and then alleged as a breach that the horse was unsound; it appeared in evidence, that the defendant agreed to sell his horse for thirty guineas, but agreed, at the same time, that if the plaintiff would take the horse at that value, he, the defendant, would purchase of the plaintiff's brother another horse for fourteen guineas, and that the difference only should be paid to the defendant. The witness described it as *one deal* between the parties, and that, but for the latter consideration, he did not believe that the bargain would have been made. It was objected, that the proof varied from the contract as laid, and showed rather a contract for the exchange of horses, paying the difference in money, than an entire money payment for the horse in question. But the court overruled the objection; Lord *Ellenborough*, C. J., observing, that the parties agreed to consider the brother's horse as fourteen guineas, in their mode of reckoning the payment for the defendant's horse; but still the consideration for the latter was thirty guineas, and the defendant received thirty guineas in money and value (e). But where the declaration stated that the defendant warranted a horse to be sound, and the proof was, that the defendant warranted the horse to be sound everywhere except a kick on the leg, it was held that this was a qualified, and not a general warranty, and consequently that there was a variance (f). But such a variance is amendable, if the defence does not depend upon the qualification (g).

Implied Warranty.—The general rule of the common law in matters of bargain and sale is *caveat emptor*, and if a purchaser buys an inferior or useless article, without taking an express warranty, he is, in the absence of fraud, remediless. If a man sell a horse with a secret malady, without warranting it to be sound, he is not liable, that is, if there be no fraud (h). “In the bargain

(b) *Alexander v. Gibson*, 2 Campb. 555, per Lord *Ellenborough*. See *Brady v. Todd*, 9 C. B. (N. S.) 592; *Howard v. Shephard*, 36 L. J., C. P. 42.

(c) *Skrine v. Elmore*, 2 Campb. 407.

(d) *Brown v. Fry*, Devon Summ. Ass. MS. 1808.

(e) *Hands v. Burton*, 9 East, 349. *Acc. Saxty v. Wilkin*, 11 M. & W. 622.

(f) *Jones v. Cowley*, 4 B. & C. 445.

(g) *Hemming v. Parry*, 6 C. & P. 580; *Mash v. Densham*, 1 M. & Rob. 442.

(h) 1 Roll. Abr. 90, (P.) pl. 4.

and sale of an existing chattel, by which the property passes, the law does not (in the absence of fraud) imply any warranty of the good quality or condition of the chattel so sold" (i). Thus where hops were sold by sample, with a warranty that the bulk of the commodity answered the sample; it was held, that the law did not raise an implied warranty that the commodity should be merchantable, though a fair merchantable price was given, and that the seller was not answerable, though the goods turned out to be unmerchantable, in consequence of a latent defect which existed in the commodity at the time of the sale, but which was unknown to the seller, arising from the fraud of the grower, from whom he had purchased, and not from any fraud in the seller; *Grose, J., and Lawrence, J.*, laid great stress upon the fact that the seller was not the grower of the hops, and that the purchaser, by the inspection of the sample, had as full an opportunity of judging of the quality of the hops as the seller himself (k). So a meat salesman, who sells a carcase with a latent defect of which he knows nothing, nothing being said at the time of the sale about the quality of the meat, does not, as a matter of law, impliedly warrant that the carcase is fit for human food (l).

To this rule, however, there are many exceptions; as where a person is employed to make a specific chattel, there the law implies a contract on his part that it shall be fit for the purpose for which it is ordinarily used (m). So where goods are ordered for a specific purpose from a person in a particular department of trade (n). So where goods of a particular denomination are sold, e.g., "waste silk" (o), "*Skirving's* Swedes" (p), "*Calcutta* linseed" (q), "steam coals" (r), there is an implied condition that they shall correspond to the description of them; and this although the seller, at the time of contracting, expressly decline all responsibility as to the quality, and the buyer has had an opportunity of inspecting it, and no fraud is suggested (s); and further, where the buyer has no opportunity of inspecting the goods, they must not only answer the specific description, but also be merchantable under that description (t). So where goods "now on passage from Singapore," were sold, this was held a warranty that they were then on board (u).

(i) *Per Parke, B., Barr v. Gibson*, 4 M. & W. 399. The rule is the same on the demise of real property, in which case the law implies no condition that it is fit for the purpose for which it is let. *Hart v. Windsor*, 12 M. & W. 68.

(k) *Parkinson v. Lee*, 2 East, 314.

(l) *Emmerton v. Matthews*, 31 L. J., C. P. 139.

(m) *Bull v. Robison*, 10 Exch. 342; *Bluett v. Osborne*, 1 Sta. 384.

(n) *Per Parke, B., Sutton v. Temple*, 12 M. & W. 64. See *Sayers v. London and Birmingham Flint Glass Co.*, 27 L.

J., Exch. 294.

(o) *Gardiner v. Gray*, 4 Campb. 144.

(p) *Allan v. Lake*, 18 Q. B. 560.

(q) *Wieler v. Schilizzi*, 17 C. B. 619.

(r) *Pacific Steam Navigation Company v. Lewis*, 16 M. & W. 783.

(s) *Josling v. Kingsford*, 13 C. B. (N. S.) 447.

(t) *Jones v. Just*, L. R. 3, Q. B. 197; *Bigge v. Parkinson*, 7 H. & N. 955; 32 L. J., Ex. 301.

(u) *Gorissen v. Perrin*, 27 L. J., C. P. 29.

So where there is a well-known and received usage of a trade, such usage is impliedly included in the contract, unless it is excluded, expressly by, or impliedly as being inconsistent with, the terms of the contract (*v*); but such usage must be clearly and distinctly proved to exist, and to be so general and notorious that parties dealing in the market must be presumed to have been aware of it; and, in order to bind persons who were not aware of it, it must be reasonable (*x*). It is usual, in the sale by auction of drugs, if they are sea-damaged, to express it in the broker's catalogue, drugs which are re-packed, and the packages which are discoloured by sea-water bearing an inferior price, although not damaged. The defendants, who had purchased some sea-damaged pimento, re-packed it, and advertised it in catalogues. The advertisements stated that it might be viewed before the sale, but did not notice that it was sea-damaged or re-packed. The defendants afforded little facility for viewing it, but they exhibited impartial samples of the quality, and sold it by auction. It was held that this was equivalent to a sale of the goods, as and for goods that were not sea-damaged, and that an action lay for the fraud (*y*).

If an order is given for a thing, stated to be for a particular purpose, (as copper for sheathing ships, that is, a particular copper, prepared in a particular manner,) which the manufacturer supplies, he impliedly undertakes that it shall answer the purpose for which it is supplied, and this although the purchaser has inspected it (*z*). So where A., after inspection of the separate parts, bought of B. *soap frames*, which were by the contract warranted to be "new frames, with all nuts and bolts complete and perfect," and the declaration alleged that the plaintiff warranted the frames to be fit for making soap, and at the trial it was proved, and found by the jury that though new, and having the proper number of nuts and bolts, the frames were not reasonably fit for the purpose of making soap, it was held that the evidence sustained the declaration (*a*). But where the order was, "send me your patent hopper and apparatus to fit up my brewing copper, with your smoke-consuming furnace," it was held, that as the purchase was of a well-defined and known machine, it was the buyer's concern whether it answered the purpose for which he wanted to use it or not (*b*). It is a distinction well founded both in reason and on authority, that if a party purchases an article upon his own judgment, he cannot afterwards hold the vendor responsible, on the ground that the article turns out to be unfit for the purpose for which it was required; but if he relies upon

(*v*) *Spartali v. Brucke*, 10 C. B. 221; 19 L. J., C. P. 294.

(*x*) *Grissell v. Bristowe*, L. R. 3, C. P. 129.

(*y*) *Jones v. Bowden*, 4 Taunt. 847.

(*z*) *Jones v. Bright*, 5 Bingh. 533.

(*a*) *Mallan v. Radloff*, 17 C. B. (N. S.) 588.

(*b*) *Chanter v. Hopkins*, 4 M. & W. 399; *Prideaux v. Bunnett*, 1 C. B. (N. S.) 613.

the judgment of the seller, and informs him (c) of the use to which the article is to be applied, the transaction carries with it an implied warranty, that the thing furnished shall be fit and proper for the purpose for which it was designed (d).

But where there is an express warranty, such warranty is not to be extended by implication. *Expressum facit cessare tacitum*. Thus where the plaintiff bought a cargo of Indian corn, then shipped at a foreign port, for a certain price, including freight and insurance to Cork, Liverpool or London, and it was agreed that the quality of the corn should be equal to the average of shipments of that article in that year, and had been shipped in good and merchantable condition, it was held, that there was no implied agreement that the corn should be in a proper condition for a foreign voyage (e); but an express warranty does not exclude a warranty which, in the absence of the express one, would have been implied by law (f).

It seems that there is no implied warranty of title on the sale of a personal chattel, the maxim of *caveat emptor* applying to title as well as quality (g); but there are so many exceptions to the rule, that they have well nigh eaten it up, so that there may be difficulty in finding cases to which the rule would practically apply (h); for if the vendor, by word or conduct, or from the mere circumstances under which he sells an article, gives the purchaser to understand that he is the owner, he will be considered to have warranted his title to them; thus, a warranty may be inferred from usage of trade, or from the nature of the trade being such, that the person carrying it on must be understood to engage, that the purchaser shall enjoy that which he buys as against all persons, e.g., where articles are bought in an ordinary retail shop (i); and, it seems, that *executory* contracts are an exception to the above rule, on the same grounds as it would be implied under similar circumstances, that a merchantable article was to be supplied; for "unless goods which the party could enjoy as his own, and make full use of, were delivered, the contract would not be performed" (i). But where a sale takes place under circumstances in which there is as it were a tacit disclaimer of warranty of title, it is clear that the purchaser buys them at his peril, as where a man buys an unredeemed pledge (k), or goods sold under a *fi. fa.* (l), or a distress for poor rates (m).

(c) This is, it seems, necessary, and the mere knowledge by the defendant of the purpose to which the article supplied was intended to be applied is not (*semble*) sufficient. *Shepherd v. Pybus*, 3 M. & G. 868.

(d) *Per Tindal, C. J., Brown v. Edgington*, 2 M. & Gr. 289.

(e) *Dickson v. Zizinia*, 10 C. B. 602.

(f) *Bigge v. Parkinson*, 7 H. & N. 955, in error.

(g) *Morley v. Attenborough*, 3 Ex. 500: see authorities there cited.

(h) *Sims v. Marryat*, 17 Q. B. 291, *per Lord Campbell*.

(i) *Morley v. Attenborough*, 3 Exch. 500; *Eicholz v. Bannister*, 17 C. B. (N. S.) 708; 34 L. J., C. P. 105.

(k) *Morley v. Attenborough*.

(l) *Chapman v. Speller*, 14 Q. B. 621.

(m) *Bagueley v. Hawley*, L. R. 2, C. P. 627.

A person contracting, without authority, as agent for a named principal, is held to have warranted that he was authorised to enter into the contract (*n*).

In contracts of marine insurance there are implied warranties in the larger sense of the word, *i.e.*, conditions, by not complying with which the assured precludes himself from taking any advantage of his contract. Thus, there is an implied condition that the assured has not concealed any material fact from the underwriter, that the ship is seaworthy (except in time policies), and that the ship shall not deviate.

Where an article is warranted, and the warranty is not complied with, the vendee has four courses, any one of which he may pursue.—

1st. He may, in certain cases, refuse to accept the article. Although the vendee of a specific chattel, delivered with a warranty, has not a right to return it, the same reason does not apply to cases of *executory* contracts. Where an article, for instance, is ordered from a manufacturer, who contracts that it shall be of a certain quality, or fit for a certain purpose, and the article sent as such is *never completely accepted* by the party ordering it; in this and similar cases, the party ordering may return it as soon as he discovers the defect, provided he has done nothing more in the meantime than was necessary to give it a fair trial: but there is no authority to show that he may return it, where he has done more than was consistent with the purpose of trial (*o*). So where the article delivered or tendered is *not* the article sold (*p*). And the same principle would seem to apply to goods sold by sample, if on delivery, but before acceptance, they are found not to correspond with the sample, provided, however, the property in them has not passed to the vendee (*q*). Where there is an agreement to take a horse back, if *on trial* he shall be found faulty, though it is accompanied with an express warranty, yet it is incumbent on the purchaser, if he discovers any fault, to use due diligence in returning the horse; for a trial means a reasonable trial (*r*).

2ndly. He may, if he wishes to rescind the contract, as soon as the unsoundness or defect is discovered, return or tender the horse or other article to the seller, with that view (*s*). It was formerly held, that this was a matter of right, and entitled the purchaser to recover the price originally paid (*t*); but it is now settled, that you

(*n*) *Collen v. Wright*, 8 E. & B. 647.

(*o*) *Per Lord Tenterden*, C. J., *Street v. Blay*, 2 B. & Ad. 456, except where the vendor has been guilty of fraud. *Ibid*. But if a party be induced to purchase an article by fraudulent misrepresentation of the seller, and after discovering the fraud, continue to deal with the article as his own, he cannot after that rescind the con-

tract and recover back the money from the seller. *Campbell v. Fleming*, 1 A. & E. 40.

(*p*) *Young v. Cole*, 3 B. N. C. 724.

(*q*) *Dawson v. Collis*, 10 C. B. 523.

(*r*) *Adam v. Richards*, 2 H. Bl. 573.

(*s*) *Caswell v. Coare*, 1 Taunt. 567.

(*t*) See *Curtis v. Hannay*, 3 Esp. 83.

cannot treat a contract as rescinded on the ground of a breach of warranty, except there was an original agreement that the party should be at liberty to rescind in such case (as in the case of a horse taken on trial), or unless *both* parties have consented to rescind it (*u*). If the seller refuses to receive back the horse, the purchaser should sell it, as soon as possible, for the best price that can be procured; for the purchaser is entitled to recover for the keep of the horse for such time *only* as would be required to sell it to the best advantage (*v*).

3rdly. He may accept it, and bring a cross action on the warranty. "I take it to be clear law, that if a person purchases a horse which is warranted, and it afterwards turns out that the horse was unsound at the time of the warranty, the buyer may, if he pleases, keep the horse and bring an action on the warranty, in which he will have a right to recover the difference between the value of a sound horse and one with such defects as existed at the time of the warranty (*x*); and the seller will be liable in such an action notwithstanding any length of time which may have elapsed (*y*); for "no length of time elapsed after the sale will alter the nature of a contract originally false. Neither is notice necessary to be given; though the not giving notice will be a strong presumption against the buyer, that the horse at the time of sale had not the defect complained of, and will make the proof on his part much more difficult" (*z*). And it is expedient in all cases to give notice as early as possible of the unsoundness or defects complained of.

4thly. He may, without bringing a cross action, use the breach of warranty in reduction of damages in an action brought for the price, and may give evidence of such breach under the general issue (*a*). Where an action was brought for the price of cinque-foin seed sold by the plaintiff to the defendant at so much per quarter, and warranted to be good new growing seed; the defence was, that it did not correspond with the warranty. It was proved, that, soon after the sale, the seed had been examined and tasted by a person of skill, who declared it not to be good growing seed; the defendant, however, did not communicate this to the plaintiff, or return the seed, but afterwards sowed part and sold the residue, which was not paid for, the purchaser declaring he would not pay for it, because it had proved wholly unproductive. It was held, that the defendant was not bound to return the seed without using

(*u*) *Per* Lord Lyndhurst, C. B., *Gompertz v. Denton*, 1 Cr. & M. 209; *Foster v. Smith*, 18 C. B. 156; *Bannerman v. White*, 10 C. B. (N. S.) 844.

(*v*) *Acc. Per* Lord Denman, C. J., *Chesterman v. Lamb*, 2 A. & E. 132.

(*x*) *Per* Lord Eldon, C. J., in *Curtis v. Hannay*, 3 Esp. 83.

(*y*) *Per* Littledale, J., in *Poulton v.*

Lattimore, 9 B. & C. 265.

(*z*) *Per* Lord Loughborough, C. J., *Fielder v. Starkin*, 1 H. Bl. 17. *Acc. Pateshall v. Tranter*, 3 A. & E. 203, where the buyer had kept the horse eight months.

(*a*) *Cousins v. Paddon*, 2 C. M. & R. 547.

it, and that by keeping it he had not precluded himself from insisting on the breach of warranty as a defence to the action; and, the jury having found for the defendant on this point, and, there not being any evidence to show that the seed was of any value, the court refused to disturb the verdict (b). The cases have established, that a breach of the warranty may be given in evidence in mitigation of damages, *on the principle of avoiding circuity of action*; and there is no hardship in such a defence being allowed, as the plaintiff ought to be prepared to prove compliance with his warranty, which is part of the consideration for the specific price agreed by the defendant to be paid (c). "In all those cases of goods sold and delivered with a warranty, and work and labour, as well as the case of goods agreed to be supplied according to a contract, it is competent for the defendant, not to set off, by a proceeding in the nature of a cross action, the amount of damages which he has sustained by breach of the contract, but simply to defend himself by showing how much less the subject-matter of the action was worth, by reason of the breach of contract; and to the extent that he obtains, or is capable of obtaining, an abatement of price on that account, he must be considered as having received satisfaction for the breach of contract, and is precluded from recovering in another action to that extent; but no more" (d). But a consequential and subsequent damage and loss must be the subject of a cross action (e).

Declaration.—The ancient method of declaring, in cases of warranty, was generally in tort; but it was not necessary to charge the *scienter*, or, if charged, to prove it. *Williamson v. Alison*, 2 East, 446. Of late years, however, it has been found more convenient to declare in assumpsit, the propriety of which practice was established in the case of *Stuart v. Wilkins*, Dougl. 18. The form given in Sched. B. of the C. L. P. Act, 1852, Form 21, in reference to horses, is, "that the defendant, by warranting a horse to be then sound and quiet to ride, sold the said horse to the plaintiff, yet the said horse was not then sound and quiet to ride." This is in accordance with the old and correct form of declaring, *warrantizando vendidit*. (See Cro. Jac. 630.) "As to the *warrantizando vendidit*," said Holt, C. J., in *Lysney v. Selby*, Ld. Raym., 1120, "that will be so, though the warranty be *before* the sale, as if upon the treaty about the buying of certain goods the buyer should ask the seller if he would warrant them to be of such a value, and to be his own goods, and the seller should warrant them, and then the buyer should demand the price, and the seller should set the price; and then the buyer should take time to consider for two or three days, and then should come and give the seller his price, though the warranty here was *before* the sale, yet this will be well, because

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| (b) <i>Poulton v. Lattimore</i> , 9 B. & C. 259. | judgment of the court in <i>Mondel v. Steel</i> , |
| (c) <i>Per Lord Tenterden</i> , C. J., in <i>Street v. Blay</i> , 2 B. & Ad. 462. | 8 M. & W. 870. |
| (d) <i>Per Parke</i> , B., in delivering the | (e) <i>Mondel v. Steel</i> , <i>supra</i> ; <i>Rigge v. Burbridge</i> , 15 M. & W. 598. |

the warranty is the ground of the treaty, and this is *warrantizando vendidit*." But a warranty given *after* the sale, and which formed no part of the bargain, is void, the consideration being past; and a receipt given a few hours after the bargain in the following form, "Received 10*l*. for a colt, warranted sound," is not conclusive evidence of the warranty having formed part of the bargain (*f*). So if the warranty be *before* the sale, if it forms no part of the contract (*g*).

The C. L. P. Act, 1852, sect. 74, enacts, that "whereas certain causes of action may be considered to partake of the character both of breaches of contract and of wrongs, and doubts may arise as to the form of pleas in such actions, any plea which shall be good in substance shall not be objectionable on the ground of its treating the declaration either as framed for a breach of contract or for a wrong." But it must be borne in mind, that the general issue in contract, *non assumpsit*, and in tort, not guilty, do not raise the same defence. In an action on a warranty, the general issue operates as a denial of the fact of the sale and warranty, but not of the breach; in an action of tort for deceit in the warranty, the general issue puts in issue both the warranty and the breach, but not, it would seem, the sale (*h*).

Damages.—Where the plaintiffs, the purchasers of seed barley, warranted of a particular quality, resold it with a like warranty to third parties, who, the crop turning out inferior, made a claim upon the plaintiffs for compensation, and the plaintiffs agreed to satisfy them, but no sum was fixed, it was held that the plaintiffs might recover against the defendant, who had originally warranted the barley to them, the amount of damages they were *liable* to pay to the sub-purchasers, though they had never in reality paid anything, and might never be forced to pay (*i*). Where the plaintiff paid for tallow in advance, which on delivery turned out to be inferior to the warranty, and the plaintiff resold the tallow for a less sum than he had prepaid, and sued in damages for the delivery of inferior tallow, it was held, that, in apportioning the damages, the sum the plaintiff had prepaid could not be taken into account, but that the true measure was, the difference between the value in the market of tallow of the quality contracted for at the time of the delivery, and the amount made by the resale of the tallow actually delivered (*k*). In an action for a breach of warranty of a horse (or other goods), the plaintiff cannot recover as special damage the loss of a bargain for resale, though the contract of resale, at a profit, had been actually completed before the unsoundness (or other defect) was discovered (*l*).

(*f*) *Fairmaner v. Budd*, 7 Bingham 574.

And see *West v. Jackson*, 16 Q. B. 280.

(*g*) *Hopkins v. Tanqueray*, 15 C. B. 30.

(*h*) Pleading Rules, 1853; *Spencer v.*

Dawson, 1 M. & R. 552.

(*i*) *Randall v. Roper*, 27 L. J., Q. B. 266.

(*k*) *Loder v. Kekulé*, 27 L. J., C. P. 27.

(*l*) *Clare v. Maynard*, 6 A. & E. 519.

CHAPTER XVI.

DETINUE (a).

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I. *Of the Action of Detinue, and in what Cases it may be maintained.*

THE action of detinue may be maintained by any person who has either an absolute or a special property in goods against another, who is in actual possession of such goods, either by delivery or finding (b), and refuses to re-deliver them. In *Kettle v. Bromsall*, Willes, 118, it was held, that detinue would lie for things lost and found, as well as for things delivered. If A. bargains and sells goods to B. upon condition, that if A. pays B. a certain sum of money at a day fixed, the sale shall be void; if A. pays the money, he may have detinue for the goods although they came not to the hands of B. by bailment, but by bargain and sale (c). In this action the plaintiff seeks to recover the goods in specie, or on failure thereof the value (for before the C. P. L. Act, 1854, it was in the election of the defendant whether he would deliver the specific goods (d), or pay the value thereof (e), and also damages for the detention.

It has been said that as this action proceeds on the ground of property in the plaintiff, *at the time of action brought*, it cannot be maintained, if the defendant took the goods tortiously (f), for by the trespass the property of the plaintiff is divested (g). If a person detain the goods of a feme covert, which came to his hands before

(a) Detinue is generally classed with actions *ex contractu*, but the gist of the action is the wrongful detainer which may occur where there has been no contract. *Danby v. Lamb*, 11 C. B. (N. S.) 427. Judgment of *Williams*, J.

(b) 1 Inst. 286 b.

(c) *Bateman v. Elman*, Cro. Eliz. 366.

(d) See Ast. Ent. pl. 202; Dalt. Shff. 322; Rast. Ent. 212.

(e) But see *post*, p. 584.

(f) 9 Hen. VII. 9 a; Bro. Abr. Detinue, pl. 53, *per Brian*, C. J.; but the

plaintiff may have replevin, pl. 36.

(g) This position is cited in Com. Dig. and other books; but the opinion of *Vavasour*, J., to the contrary, in the same case, seems to be better founded. See the reasoning of *Anderson* and *Warburton*, Js., in *Bishop v. Montague*, Cro. Eliz. 824, to the same effect, but applied to the action of trover. *Mills v. Graham*, 1 N. R. 140. It is to be observed that *Brian*, C. J., draws a distinction between property and right of property.

the marriage, the husband alone must bring the action; because the property is in him *at the time of action brought* (*h*). Plaintiff had delivered to defendant the title deeds of plaintiff's wife's estate; plaintiff afterwards levied a fine of the estate to the use of his son. Plaintiff afterwards commenced an action of detinue against the defendant for the deeds; it was held, that as the muniments of an estate belong to the person who has the legal interest in it (*i*), plaintiff could not recover; for at the time the action commenced, the deeds were not the property of the plaintiff, but of the son; who, being the true owner, was the party to sue for them (*k*).

Property in the plaintiff without his ever having had possession is sufficient. Hence an heir may maintain detinue for an heirloom (*l*). So if it be enacted by a statute, that goods imported in any other manner than as therein directed shall be forfeited, one moiety to the king, and the other moiety to a common informer, a subject may have detinue for the moiety of goods imported contrary to the provisions of the statute; for by the illegal importation the property is divested out of the owners; and by bringing the action it is vested in the plaintiff, by relation, from the time of the offence committed (*m*). So if I deliver goods to A., to deliver to B., B. may have detinue; for the property is vested in him by the delivery to his use (*n*). The goods demanded must be such as can be distinguished from other property by certain discriminating marks: as money in a bag (*o*); a horse; a cow (*p*); a piece of gold, value twenty-one shillings (*q*); deeds concerning the inheritance of the plaintiff's land, if he can describe what they are, and what land they concern, or if such deeds are in a chest (*r*); and the like. But for money not in a bag or chest (*s*), or corn (*t*), and other things which cannot be distinguished from property of the same kind or description, detinue will not lie. The receiver of a letter has a sufficient property in the paper upon which it is written to entitle him to maintain detinue for it against the sender into whose hands it had come as a bailee (*u*).

The property in the halves of bank notes sent in payment of a debt due to the receiver from a third person, with an intention on the part of both sender and receiver that the other halves are to follow, remains in the sender until he sends the second halves, the payment being until then inchoate and conditional. It is, there-

(*h*) Bull. N. P. 50.

(*i*) See *Lord v. Wardle*, 3 B. N. C. 680; whether the purchase money has been paid or not; *Goode v. Burton*, 1 Exch. 189; mortgagee in fee, *Newton v. Beck*, 27 L. J., Exch. 272.

(*k*) *Philips v. Robinson*, 4 Bingh. 106.

(*l*) Bro. Abr. Detinue, pl. 30.

(*m*) *Roberts v. Withered*, 5 Mod. 193; *Wilkins v. Despard*, 5 T. R. 112.

(*n*) 1 Roll. Abr. 606, (C.) pl. 1.

(*o*) 1 Roll. Abr. 606, (A.) pl. 1.

(*p*) F. N. B. 322, (A.) ed. 4to.

(*q*) Bull. N. P. 50.

(*r*) 1 Inst. 286, b.

(*s*) *Banks v. Whetston*, Cro. Eliz. 457.

(*t*) 1 Inst. 286, b.

(*u*) *Oliver v. Oliver*, 11 C. B. (N. S.) 139.

fore, open to the sender at any time before sending the second halves, to disaffirm the transaction, and re-demand the first halves from the receiver, who is liable to an action of detinue for refusing to return them (x).

The gist of the action is the detainer (y). Hence, if the bailee of goods die, detinue will not lie against his personal representative, unless he takes possession of the goods (z). And if there are three executors, and one hath possession, detinue lies against him only (a). But if, after the death of the bailee, a stranger takes the goods, detinue lies against such stranger (b). The action lies, though the defendant quitted the possession before action brought, by delivery of the goods to another (c). But it does not lie against him who never had possession of the chattel, though it does against one who once had, but has improperly parted with the possession of it (d); or lost it through negligence (e); *secus*, against one who has lost it without negligence (f). If goods be delivered to husband and wife, detinue ought to be brought against the husband only (g). But if they are delivered to the wife before marriage, the action must be brought against husband and wife (h).

From the preceding cases it may be collected, that the grounds of the action of detinue are, 1. A property in the plaintiff, either absolute or special (at the time of action brought) in personal goods which are capable of being ascertained. 2. A possession in the defendant. 3. An unjust detention on the part of the defendant.

II. Of the Pleadings and Evidence.

If the action be brought for several articles, it is not necessary to set forth the separate value of each in the declaration (i); but the jury must sever the values by their verdict. "The nature of the action requires that the verdict and judgment be such that a specific remedy may be had for the recovery of the goods detained, or a satisfaction in value for each several parcel, in case they be not delivered" (j).

"The plea of *non detinet* shall operate as a denial of the detention of the goods by the defendant, but not of the plaintiff's property therein, and no other defence than such denial shall be admissible under that plea" (k). Hence, *non detinet* puts in issue an

(x) *Smith v. Mundy*, 3 E. & E. 22.
 (y) *Gledstane v. Hewitt*, 1 Cr. & J. 565.
 (z) 1 Roll. Abr. 607, (D.) pl. 1.
 (a) Bro. Abr. Detinue de biens, pl. 19.
 (b) 1 Roll. Abr. 607, (D.) pl. 2.
 (c) Com. Dig. Detinue, (A.).
 (d) *Jones v. Dowle*, 9 M. & W. 19;
 see *Goodman v. Boycott*, 2 B. & S. 1.

(e) *Reeve v. Palmer*, 27 L. J., C. P. 327.
 (f) *Roux v. Wiseman*, 1 F. & F. 45.
 (g) 38 Edw. III. 1, a.
 (h) 1 Inst. 351, b.
 (i) See Form 29, Sched. B., Com. Law
 Proc. Act, 1852.
 (j) *Pawly v. Holly*, 2 W. Bl. 853.
 (k) 15 Pl. R. H. T. 1853.

action on adverse detention, and no other fact (*l*). If the defence, therefore, be, that the goods were not the plaintiff's, or that the defendant was justified in detaining them, that must be specially pleaded (*m*). Under a plea of not possessed, the defendant cannot set up a lien (*n*), nor a tenancy in common with the plaintiff (*o*). Upon issue joined on such plea, it is no defence that there are other persons co-tenants with the plaintiff who are not joined in the action (*p*). A defence that the articles claimed were delivered by the defendant to a third person, with the plaintiff's consent, may be given in evidence under *non detinet* (*q*). Money could not formerly be paid into court in this action (*r*), but it may now under s. 25 of C. L. P. Act of 1860, by leave of the court or a judge.

III. *Of the Judgment.*

The form of the judgment in this action is, that the plaintiff do recover the goods in question, or the value thereof, if the plaintiff cannot have the goods, and his damages; that is, damages for the detention (*s*). The language of the judgment being in the alternative, that the plaintiff do recover the goods, or the value thereof, it is incumbent on the jury to find the value, and an omission in this respect cannot be supplied by a writ of inquiry of damages (*t*); and is ground of error (*u*). If several things are demanded, the jury ought to find the value of each particular thing (*x*).

That the option of giving up the goods or paying the value should be *in the defendant* being considered a hardship, it was enacted by the Common Law Procedure Act, 1854, sect. 78, that the court or a judge may, upon the application of *the plaintiff* in any action for the detention of a chattel, order execution to issue for the return of the chattel, without giving the defendant the option of paying the value, and that, if the chattel cannot be found (unless the court or judge should otherwise order), the sheriff shall distrain all property of the defendant till he render such chattel, or, at the option of the plaintiff, levy the assessed value; provided that the plaintiff shall, either by the same or a separate writ of execution, be entitled to have levied his damages, costs and interest.

(*l*) *Clements v. Flight*, 16 M. & W. 42.

(*m*) See *Richards v. Frankum*, 6 M. & W. 420.

(*n*) *Mason v. Farnell*, 12 M. & W. 684, overruling *Lane v. Tewson*, 12 A. & E. 116. A plea of "lien" will be allowed with pleas of "*non detinet*" and "not possessed." *Barnewall v. Williams*, 7 M. & G. 403.

(*o*) *Mason v. Farnell*, 12 M. & W. 674.

(*p*) *Broadbent v. Ledward*, 11 A. & E. 209.

(*q*) *Anderson v. Smith*, 29 L. J., 460, Ex.

(*r*) *Allan v. Dunn*, 1 H. & N. 572;

Moore v. Dublin and Meath Railway Co., 15 Irish C. L. R. 140.

(*s*) Townsend's Judgments, i. 344; ii. 82—85; Aston's Entries, 202, pl. 8; *Peters v. Heyward*, Cro. Jac. 681, 682; Keilw. 64 b; per Frowick, C. J. The judgment in trover is, "that the plaintiff do recover his damages." *Knight v. Bourne*, Cro. Eliz. 116.

(*t*) Per Coke, J., in *Cheney's case*, 10 Rep. 119 b; per Holt, C. J., in *Herbert v. Waters*, Salk. 206.

(*u*) *Phillips v. Jones*, 15 Q. B. 859.

(*x*) East. T. 3 Hen. VI. 43, a.

CHAPTER XVII.

DISTRESS.

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I. *Of the Nature and Origin of a Distress.*

THE power of distraining was given to the lord (in lieu of the forfeiture of the land), for the purpose of forcing the tenant to perform those services which were the consideration of his enjoyment of it. Hence the distress was considered merely as a pledge, and the detention thereof was justifiable only so long as the duties incident to the tenure of the land remained undischarged. If the tenant offered gages and pledges for the performance of the services, and the lord, after such offer, persisted in detaining the distress, the tenant might sue out a writ of replevin, the tenor of which was, that the defendant had taken and unjustly detained the goods, "against gages and pledges." This form is still preserved in the proceedings in replevin, but the offer of gages and pledges has fallen into disuse. The replevin was considered as so much a matter of right, that if a person by deed granted a rent with a clause of distress, and granted further, that the distresses taken should be irreplevisable, yet they might be replevied, such a restriction being against the nature of a distress (*a*).

Goods distrained are not liable to the distress of another subject,

because they are in the custody of the law (*b*); nor to another subject's execution, for the same reason (*c*). But an extent against the king's debtor shall prevail before actual sale, notwithstanding the custody of the law, on the ground of the general preference allowed by law to the king's debts (*d*). The right of distress is not so inseparable an incident to rent service that it cannot be postponed by contract between the parties (*e*).

II. Of the Causes for which a Distress may be taken.

1. *At Common Law*.—A distress may be taken for the non-performance of services, either certain or such as may be reduced to certainty—*e. g.* to shear the sheep of the lessor within the manor (*f*), to pay so much per yard for all marl got, and so much per thousand for all bricks made (*g*)—*viz.* heriot-service (*h*), rent-service (*i*), suit-service (*k*), that is, suit to a hundred-court, or court-baron; for non-payment of a fine imposed on an inhabitant of a manor by the steward of a court leet for refusing to take the customary oath, when elected to the office of a constable (*l*); for non-payment of an amercement in a court leet (*m*) for a nuisance (*n*), or for an offence done in court (*o*); lastly, at common law, goods or cattle damage feasant may be distrained (*p*).

A landlord cannot distrain unless there be an actual demise to the tenant at a fixed rent. Hence, where the tenant holds under an agreement for a future lease, and no lease has been executed, and no rent subsequently paid, the landlord cannot distrain (*q*). But payment of rent under such an agreement will constitute an acknowledgment of a tenancy from year to year, under which the landlord will be authorized to distrain (*r*); and so will an admission of a charge of half a year's rent in an account between the parties (*s*). *Secus*, where the tenant holds over after notice to quit by

(*b*) Bro. Distr. 75, cited by Lord C. B. Parker, 2 Ves. sen. 294.

(*c*) Bro. 28; Finch, 11, cited by Lord C. B. Parker, in *R. v. Cotton*, Parker, 120.

(*d*) *R. v. Cotton*, Parker, 112, recognized in *Giles v. Grover*, 9 Bingh. 128, where it was held that the goods of a debtor seized under a fi. fa., but not sold, might be taken under an extent in chief, or in aid. *Grove v. Aldridge*, 9 Bingh. 428 acc.

(*e*) *Giles v. Spencer*, 26 L. J., C. P. 237.

(*f*) 1 Inst. 96, a.

(*g*) *Daniel v. Gracie*, 6 Q. B. 145.

(*h*) 1 Roll. Abr. 665, E. pl. 5; Plowd. 98.

(*i*) Litt. sect. 213.

(*k*) 1 Roll. Abr. 665, E. pl. 2.

(*l*) 8 Co. 41, a; but see *per Gibbs*, C. J., *Cleary v. Stevens*, 8 Taunt. 416; *Fletcher v. Ingram*, 1 Salk. 175.

(*m*) 8 Co. 41, a.

(*n*) *Prat v. Stern*, Cro. Jac. 382.

(*o*) 1 Roll. Abr. 666, F. pl. 2.

(*p*) 1 Inst. 142, a., 161, a.

(*q*) *Dunk v. Hunter*, 5 B. & Ald. 322; *Regnart v. Porter*, 7 Bingh. 451; *Riseley v. Ryle*, 11 M. & W. 16; *Mechelin v. Wallace*, 7 A. & E. 54.

(*r*) *Knight v. Bennett*, 3 Bingh. 361; *Mann v. Lovejoy*, Ry. & M. 355.

(*s*) *Cox v. Bent*, 5 Bingh. 185; *Braythwaite v. Hitchcock*, 10 M. & W. 494, acc.

the landlord, and there is not any evidence of a renewal of the tenancy (*t*).

By 12 & 13 Vict. c. 106, s. 129, no distress for rent levied after an act of bankruptcy, upon the goods of any bankrupt (whether before or after the issuing the fiat, or the filing the petition), shall be available for more than one year's rent, accrued prior to the date of the fiat or the filing of the petition, but the landlord, or person to whom the rent is due, shall be allowed to come in as a creditor for the overplus of the rent due, and for which the distress shall not be available (*u*).—This section applies only to rent accrued due before the bankruptcy (*x*), and is intended for the protection of the assignees only, and not for that of mortgagees, although in actual possession of the goods, upon which, therefore, if on the premises, the landlord may distrain (*y*). The landlord must distrain in order to enforce his claim against the assignees (*z*); and he retains such right until the removal of the goods (*a*); although the messenger be in possession (*b*). If the assignees decline the lease, the property remains in the bankrupt, and the landlord may distrain for the rent (*c*); but he cannot prove and distrain for the same rent (*d*). The certificate does not operate as a release of the rent; it operates only to discharge the person and goods of the bankrupt, but does not affect collateral remedies (*e*).

2. *By Prescription*.—By prescription, a distress may be taken for an amerciament in a court baron (*f*); for a penalty imposed for a breach of a by-law (*g*); for a toll in a fair (*h*). A distress may be taken, where the custom warrants it, for an amerciament or fine imposed by the steward of a court baron. Co. Ent. tit. Replevin, pl. 1.

3. *By Statute*.—It would be an endless task to enumerate all the statutes which give a remedy by distress; the following, however, cannot be omitted:—

By 4 Geo. II. c. 28, s. 5—Every person, body politic and corporate may have the like remedy by distress, and by impounding and selling the same, in cases of rent-seck, rents of assize, and chief rents, which have been duly answered or paid, for the space of three years, within the space of twenty years before the 23rd day of January, 1731, or shall be thereafter created, as in case of rent reserved upon lease.—In *Bradbury v. Wright*, Doug. 624, the

(*t*) *Jenner v. Clegg*, 1 M. & Rob. 213;
Waring v. King, 8 M. & W. 571, *per*
Lord Abinger, C. B.

(*u*) This provision is similar to the
6 Geo. IV. c. 16, s. 74.

(*x*) *Briggs v. Sowry*, 8 M. & W. 729.

(*y*) *Brocklehurst v. Lawes*, 7 E. & B. 176.

(*z*) *Gethin v. Wilks*, 2 Dowl. 189.

(*a*) *Exp. Descharmes*, 1 Atk. 103.

(*b*) *Briggs v. Sowry*, 8 M. & W. 729.

(*c*) *Brocklehurst v. Lawes*, 7 E. & B.
176; see *Cartwright v. Glover*, 30 L. J.
Ch. 324.

(*d*) *Exp. Grove*, 1 Atk. 104.

(*e*) *Newton v. Scott*, 10 M. & W. 471.

(*f*) 1 Roll. Abr. 666, F. pl. 4.

(*g*) *Lord Crumwell's case*, Dyer, 322, a.

(*h*) 1 Roll. Abr. 666, F. pl. 5, 6.

court were of opinion that a rent reserved on a grant in fee (i) made after the statute of *Quia emptores*, and before the 4 Geo. II. c. 28, was in its nature a rent-seck, and that it could not be distrained for except under the preceding statute: in which case the distrainor, in his avowry, ought to have alleged, that the rent had been duly answered or paid for the space of three years (k), within the space of twenty years, before the first day of the session of parliament in which this statute was made. By 11 Geo. II. c. 19, s. 18, landlords may distrain for double rent, upon tenants who do not deliver up possession after having given notice of their intention to quit, during all the time such tenants continue in possession. This statute applies to those cases only, where the tenant has the power of determining his tenancy by a notice; and where he actually gives a valid notice sufficient to determine it (l).

III. *Of the Things which may, and the Things which may not be distrained.*

1. *Of the Things which may be distrained.*—It may be laid down as a general proposition, that all moveable chattels of the tenant may be distrained for rent arrear, if they are found upon the land out of which the rent issues, but nowhere else (m). Hence, where the *exclusive use* of the land of the river Thames, in front of a wharf between high and low water-mark, was demised as appurtenant to the wharf, for the accommodation of the tenants thereof, but the land itself between high and low water was not demised, it was held that the lessor could not distrain, for rent arrear, barges, the property of the tenant, lying in the space between high and low water-mark, and attached to the wharf by ropes (n).

If the cattle of a stranger are *trespassers* on the land of the tenant, the lord may distrain them, although the stranger made

(i) A rent of this kind, prior to the statute of *quia emptores*, would have been properly denominated a fee-farm rent. The word *fee-farm* imports every rent or service, whatever the quantum may be, which is reserved on a grant in fee. It is not properly applicable to any rents, except rent-service. Hence, since the statute of *quia emptores*, the granting in fee-farm, except by the king, is become impracticable; for, by the operation of that statute, the grantor parting with the fee is without any reversion, and without a reversion there cannot be a rent-service. Litt. sect. 216. But a grant in fee, reserving a perpetual rent, with a power of

distress, will be good as a rent-charge. Harg. 1 Inst. 143, b, n. 5. And it seems, that if such a rent were created at this day, without a power of distress, as it must be considered as a rent-seck, it would be distrainable for under the above statute. See *Vigers v. Dean and Chapter of St. Paul's*, 14 Q. B. 909.

(k) They need not be *consecutive* years. *Musgrave v. Emmerson*, 10 Q. B. 326.

(l) *Johnstone v. Hudlestone*, 4 B. & C. 922.

(m) Com. Dig. Distress, B. 1; 4 T. R. 567, *Gorton v. Falkner*, per Lord Kenyon, C. J.

(n) *Capel v. Buszard*, 6. Bingh. 150.

fresh suit (*o*), and although the cattle be not levant and couchant (*p*). But if the cattle of their own accord leave the land, the lord cannot distrain them (*q*). And if the landlord either expressly or impliedly consent that the stranger's chattels shall be free from distress, he is a trespasser if he distrain them (*r*). So a lessor cannot distrain cattle which escape from a close belonging to a stranger, into the land whence the rent issues, through defect of the fences, which either the lessor (*s*) or his tenant (*t*) was bound to repair. But "there is a difference between a lord distraining within his seignory, and a landlord distraining for rent reserved on his own lease: for the lord has nothing to do with the land or the fences, and so it is not material to him whether the fences are repaired or not: but it is otherwise of a landlord: for he himself ought to repair, or to provide that his tenant repairs them, else he would take advantage of his own wrong. And this diversity seems to be warranted by the books, Dy. 317, 318; 22 Edw. IV. 49, b.; 7 Hen. VII. 1; 10 Hen. VII. 21; 15 Hen. VII. 17. But if the cattle escape into the land without any defect of the fences, or where the tenant of the land in which they are distrained is not bound to repair the fences, through the defect of which the cattle escape and are distrained, it is immaterial to the lord or landlord whether they are levant and couchant or not" (*u*). A person into whose field cattle have strayed through defect of fences which he was bound to repair, cannot distrain them damage feasant in another field into which they have thence got by breaking through a hedge which he kept in good repair, since his neglect was the original cause of the mischief (*v*). The grantee of a rent-charge may distrain the goods of a stranger who is not shown to hold by a title paramount to the rent-charge (*x*).

Where cattle are distrained damage feasant, and put into a sufficient pound and escape without default or neglect of the distrainor, he may maintain trespass for the damage to his land; for otherwise he would be left without remedy (*y*).

If the estate of a tenant at will be determined either by his own death or by the act of the landlord, he or his executors are entitled to reap the corn sown by him. And, therefore, such corn, though purchased by another person, cannot be distrained (in case of the determination of the tenancy at will) for rent due from a subsequent tenant, "for then the landlord would have nothing to do but to determine the estate of his tenant at will as soon as he had sown all his corn, and then to let his land to another, reserving rent upon a day before harvest" (*z*).

(*o*) 7 Hen. VII. 1, b, 2, a.
 (*p*) 15 Hen. VII. 17, b.
 (*q*) 11 Hen. VII. 4, a.
 (*r*) *Horsford v. Webster*, 1 C. M. & R.
 696.
 (*s*) 2 Leon. 7.
 (*t*) *Dyer*, 317, b, 318, a.
 (*u*) *Per Saunders*, in *Pool v. Longue-*

vill, 2 Wms. Saund. 289.
 (*v*) *Singleton v. Williamson*, 7 H. & N.
 410; 31 L. J., Ex. 17.
 (*x*) *Saffery v. Elgood*, 1 A. & E. 191;
Johnson v. Faulkner, 2 Q. B. 925.
 (*y*) *Williams v. Price*, 3 B. & Ad. 695.
 (*z*) *Eaton v. Southby*, Willes, 131. It
 will be observed that the above reasons

Of Things which may not be distrained.—With respect to those things which by law are privileged from distress, it may be observed that some are privileged *absolutely*, and some *conditionally*. In the first class may be numbered,—

1. Animals *feræ naturæ*, whereof a valuable property is not in any person; as bucks, does, &c. Deer kept within an inclosure do not fall within this class, for they may be distrained (*a*).

2. Such things as cannot be restored to the owner in the same plight and condition as they were in at the time of taking them (*b*). This exemption proceeds on the ground of the distress having been considered at common law merely as a pledge; and for this reason, sheaves and shocks of corn were not distrainable (*c*), but by 2 W. & M. c. 5, s. 3,—sheaves or cocks of corn, or corn loose or in the straw, in any barn, rick, &c., or hay, lying upon any part of the land charged with the rent, may be seized, secured, and locked up in the place where found, in the nature of a distress, until replevied; but the same must not be removed to the damage of the owner from such place (*d*).—The above section extends to corn whether threshed or not (*e*), but not to growing corn (*f*).

So things fixed to the freehold, *e. g.*, furnaces, cauldrons (*g*), kitchen ranges, stoves, coppers, grates (*h*), the doors or windows of a house, or the like (*i*); on the same ground, *viz.*, that these cannot be restored in as good a plight (*k*). For a similar reason, it seems, growing corn could not at common law be distrained (*l*). But now by 11 Geo. II. c. 19, s. 8,—*Landlords*, or their bailiffs, or other persons empowered by them, may distrain corn, grass, or other *product*, growing on any part of the land demised.—The word “product,” in the foregoing section, applies to such products of the land only as are similar to those specified; to all of which the process of becoming ripe, and of being cut, gathered, made, and laid up when ripe, is incidental. Hence trees, shrubs, and plants, growing in a nursery-ground, cannot be distrained for rent (*m*). The section does not extend to the grantee of an annuity with a power of distress (*n*).

do not apply with any force to the case of the death of the tenant at will, over which the landlord can of course have no control.

(*a*) *Davies v. Powell*, Willes, 47.

(*b*) 1 Inst. 47, a.; *Darby v. Harris*, 1 Q. B. 895.

(*c*) *Wilson v. Duckett*, 2 Mod. 61.

(*d*) See *Johnson v. Faulkner*, 2 Q. B. 925.

(*e*) *Anon.*, Lutw. 214.

(*f*) *Owen v. Legh*, 3 B. & Ald. 470.

(*g*) 1 Inst. 47, a.

(*h*) *Darby v. Harris*, 1 Q. B. 895. The proper measure of damages in an action

for distraining fixtures is not the amount at which they are condemned, nor the amount paid for them by the tenant, but it is their value to an incoming tenant, and the amount he would pay the outgoing tenant for them, without deducting the rent. *Moore v. Drinkwater*, 1 F. & F. 134; *Lockley v. Pye*, 8 M. & W. 133.

(*i*) 1 Inst. 47, a.

(*k*) *Darby v. Harris*, 1 Q. B. 895.

(*l*) 1 Roll. Abr. 666, (H.) pl. 3.

(*m*) *Clark v. Gaskarth*, 8 Taunt. 431. As to eatage, see *Horsford v. Webster*, 1 C. M. & R. 699, *per Parke*, B.

(*n*) *Miller v. Green*, 8 Bingh. 92.

3. Things delivered to a person exercising a trade (*o*) or employment, to be carried (*p*), wrought or manufactured in the way of his trade, are not distrainable,—as cloth delivered to a tailor (*q*); goods sent to an auctioneer to be sold on premises occupied by him (*r*); worsted yarn sent to a stocking-weaver (*s*); a bullock sent by one butcher to the shop of another to be slaughtered (*t*). So a horse standing in a smith's shop, for the purpose of being shod, or in a common inn, cannot be distrained, because it must be presumed that such things so found belong to strangers (*u*). So goods of the principal, in the hands of his factor, cannot be distrained by the landlord of the factor's premises for arrears of rent due to him from the factor; for *the advancement of trade* equally requires that goods should be placed in the hands of a factor for sale, as that they should be placed in the hands of a carrier for carriage; and the instances enumerated by Sir *Edward Coke*, under the exception in favour of trade, are only put by way of example (*v*). So goods landed at a wharf, and deposited by a factor to whom they were consigned, in a warehouse on the wharf, until an opportunity for sale should arise, are not distrainable for rent due in respect of the wharf and warehouse (*x*). So goods in pawn, although they have been pledged for more than twelve months, are privileged from distress (*y*). The proper measure of damage is the value of the goods, and not the plaintiff's interest therein.

But the principle of the above exception in favour of trade is not to be extended. Hence where salt was manufactured and publicly sold at certain salt-works, and carried away in boats of the purchasers, which came, for the purpose of being loaded with it, into a cut or canal on the premises communicating with a public navigation; and the boat of A., an alkali-manufacturer, was lying in the cut or canal for the purpose of receiving and carrying away salt bought by A. for the purposes of his manufacture; it was held, that the boat was not privileged from distress for arrears of an annuity issuing out of the land on which the salt-works were erected, and granted by the manufacturer and seller of the salt (*z*). So brewer's casks, left by the brewer in a public-house until the liquor contained in them has been consumed, are not exempt from a distress for rent arrear in respect of the public-house (*a*).

(*o*) 1 Inst. 47, a.

(*p*) *Gisbourn v. Hurst*, Salk. 249.

(*q*) *Simpson v. Hartopp*, Willes, 19.

(*r*) *Adams v. Grane*, 1 Cr. & M. 380.

(*s*) *Wood v. Clarke*, 1 Cr. & J. 484.

But the privilege is confined to the materials which the employer supplies, and does not extend to the machinery by which the working up is effected. *S. C.*

(*t*) *Brown v. Shevill*, 2 A. & E. 138;

Gibson v. Ireson, 3 Q. B. 39, *acc.*

(*u*) It seems that the privilege of a common inn does not extend to a livery-stable. See *Francis v. Wyatt*, 3 Burr.

1498, where the question was "whether a carriage standing in the yard of a livery-stable was distrainable for rent due to the landlord from the keeper of the livery-stable?"

(*v*) *Gilman v. Elton*, 3 B. & B. 75.

(*x*) *Thompson v. Mashiter*, 1 Bingh. 283.

(*y*) *Swire v. Leach*, 18 C. B. (N. S.) 479; 34 L. J., C. P. 150.

(*z*) *Muspratt v. Gregory*, 3 M. & W. 677 (*on error*).

(*a*) *Joule v. Jackson*, 7 M. & W. 450.

4. Goods in the custody of the law, *e. g.*, goods distrained, damage feasant or otherwise (*b*); so growing corn sold under a *fi. fa.* is protected from a distress for rent (*c*). But goods seized by a messenger under a fiat in bankruptcy are not while in his custody privileged from distress for rent due from the bankrupt to his landlord, for they are not in the custody of the law (*d*).

By 14 & 15 Vict. c. 25, s. 2—If any growing crops are seized and sold by the sheriff under a *fi. fa.*, such crops, so long as they remain on the land, may, in default of any sufficient distress of the goods and chattels of the tenant, be distrained for rent, accruing due *after* such seizure and sale, notwithstanding any sale or assignment of them by the sheriff. This only applies to rent accruing *after* the seizure. For rent accruing *before*, the ordinary rule would apply, that goods *in custodia legis* are not distrainable; in such a case, therefore, if the sheriff had seized them under a *fi. fa.*, no distress could be made (*e*).

5. Things in actual use, as a horse whereon a person is riding, or an axe in the hands of a person cutting wood, &c. (*f*), on the ground, that if in such cases a power of distress were given by law, the exercise of it would frequently lead to a breach of the peace (*g*). As an illustration of this exemption it may be observed, that even chattels damage feasant, which as a general rule may be distrained, even though put on the land of the distrainor by a stranger, and without the privity of the owner (*h*), cannot be distrained if in actual use. Thus a horse whereon a man is riding cannot be distrained damage feasant (*i*); nor a horse and cart damage feasant, if under the personal care of and being used by any person (*k*); for the same exemption is allowed here as in cases of distress for rent arrear, and for the same reason; lest by the permission of such distress a breach of the peace should ensue.

6. By 7 Ann. c. 12, s. 3, it is enacted and declared, that process of any distress against the goods of any ambassador, or other public minister of a foreign state, or of their domestic servants, is void (*l*).

Among those things which are privileged from distress, conditionally, may be numbered,—

1. Beasts of the plough, which are exempt, if there be a sufficient distress besides on the land whence the rent issues (*m*), on

(*b*) 1 Inst. 47, a; *per Parke, B., Kerby v. Harding*, 6 Exch. 238.

(*c*) *Wright v. Dewes*, 1 A. & E. 641; unless left for an unreasonable time after it is ripe. *Peacock v. Purvis*, 2 B. & B. 362.

(*d*) *Briggs v. Sowry*, 8 M. & W. 729.

(*e*) *Wharton v. Naylor*, 12 Q. B. 673.

(*f*) 1 Inst. 47, a.

(*g*) *Per Kenyon, C. J., Gorton v. Falkner*, 4 T. R. 565.

(*h*) 1 Roll. Abr. 665, D. pl. 1.

(*i*) *Storey v. Robinson*, 6 T. R. 138; *per Denison, J., in Collins v. Rennison*, Say. 139.

(*k*) *Field v. Adames*, 12 A. & E. 649. See *Bunch v. Kennington*, 1 Q. B. 679, as to a dog.

(*l*) See *Novello v. Toogood*, 1 B. & C. 554.

(*m*) 1 Inst. 47 a, b, 161, a.

the ground of encouraging husbandry, and also because a man should not be left quite destitute of the means of getting his living (*n*). "The landlord has a right to resort to the subjects of distress which are *immediately* available to raise the arrears of rent by sale, and is not bound to take those which cannot be productive till a future period (as growing crops). If there are other moveable chattels to the amount of the rent and expenses, besides *averia carucae*, he would not be justifiable in taking the latter; but if there are not (*o*), he has a right to take all, or so many of the beasts of the plough as may be necessary with the other moveable and saleable chattels to satisfy the arrears and charges" (*p*). Beasts of the plough, however, may be distrained for the poor-rates, although there are other distrainable goods on the premises, more than sufficient to answer the value of the demand (*q*). This decision proceeded on the ground, that a seizure under the 43 Eliz. c. 2, and similar acts, resembled a common law distress only in being replevisable; and that it was in other respects analogous to a common law execution, under which any goods of the debtor may be seized.

2. Implements of trade, as a stocking-frame (*r*), or a loom (*s*), though not actually in use (*t*), if there is sufficient distress besides (*u*); this exemption too is in favour of trade, and on the ground of the hardship of depriving a man of his only means of getting his living (*x*). Where a threshing-machine was not in use, and there was not any evidence of other goods being on the premises, it was held, that the threshing-machine was not privileged from distress (*y*).

IV. Who may Distrain (*z*).

The king may reserve a rent out of a franchise or matter incorporeal, as well as out of lands, and may distrain for it on any other lands of the tenant not subject to the rent; but not on such other lands of the tenant as are underlet, or extended under an *elegit*.

(*n*) Willes, 515.

(*o*) Or if he has reasonable grounds (by appraisalment or otherwise) for believing that there will not be sufficient without them. *Jenner v. Yolland*, 6 Price, 5; and there is nothing (*semble*) to prevent them, if taken lawfully, from being sold before the other goods. *S. C.*

(*p*) *Per Parke, B.*, delivering judgment, *Piggott v. Birtils*, 1 M. & W. 441.

(*q*) *Hutchins v. Chambers*, 1 Burr. 579.

(*r*) *Simpson v. Hartopp*, Willes, 512.

(*s*) *Gorton v. Falkner*, 4 T. R. 565.

(*t*) *Narget v. Nias*, 1 E. & E. 439.

(*u*) *Roberts v. Jackson*, Peake, Add. Ca. 37, in which case it appeared there were other goods on the first floor belonging to lodgers in the house.

(*x*) Willes, 512.

(*y*) *Fenton v. Logan*, 9 Bingh. 676.

(*z*) The provisions of 13 Edw. I. c. 37, that no distress shall be taken but by bailiffs sworn and known, do not apply to a distress for rent. *Begbie v. Hayne*, 2 B. N. C. 124.

By 22 Car. II. c. 6, the grantee of a fee-farm rent purchased from the crown has the same power of distress as the king had (a).

By 7 Hen. VIII. c. 4,—“recoverors” of manors, lands, and advowsons, their heirs and assigns, may distrain for rents, services, &c., and have like remedy as the recoverees might have had (b).

By 32 Hen. VIII. c. 37, s. 1 (c),—The personal representatives of tenants in fee, tail, or for life, of rent-services, rent-charges, rent-seck, and fee-farms, may distrain for the arrears due at the time of the death, upon the land charged with the payment, so long as the lands continue in the seisin or possession of the tenant in demesne (d), who ought to have paid the rent or fee-farm, or of some person claiming under him by purchase, gift or descent.

This statute provides a remedy by distress where the testator dies seised of a rent to him and his heirs, or for life, and where by his death there was not any such remedy for the executor at the common law; hence the executor of a tenant for life of a rent-charge may distrain for rent arrear under this statute (e); but the statute does not apply to a tenant *for years* of a rent-charge, although it be granted to the testator for years, *if he live so long*, for he is still tenant for years (f), and not within the words “tenant in fee simple, fee tail, or for term of lives” (g). Nor does the statute apply to ordinary cases of demise for a term by the owner in fee where there is a reversion in the testator. A. seised in fee, let to the plaintiff for twenty-one years, and afterwards dying seised of the reversion, the defendant administered, and distrained for half a year’s rent due to the intestate, for which he avowed. On demurrer to the avowry, it was objected that there was not any privity of estate between the administrator and the lessor, and therefore the avowry, which is in the realty, could not be maintained by him. And it was observed, this was a case out of the 32 Hen. VIII. c. 37, for that only gives a remedy by way of distress for rents *of freehold*; and of this opinion the court seemed (h). And in *Prescott v. Boucher*, 3 B. & Ad. 849, it was held, that a person who was seised in fee of land and demised it for a term of years, reserving a rent, was neither “tenant *in fee simple, fee tail, or for term of lives* of the rent (for the utmost that could be said was, that he was tenant *for years* of the rent, and he was not even that),

(a) *Attorney-General v. Mayor of Coventry*, 1 P. Wms. 306. See *ante*, p. 588 n. (i).

(b) See 1 Inst. 104 b.

(c) The statute does not apply to copyhold rents. *Appleton v. Doily*, Yelv. 135.

(d) *i. e.* in occupation; *per Burroughs, J., Meriton v. Gilbee*, 8 Taunt. 162.

(e) *Hool v. Bell*, 1 Ld. Raym. 172.

(f) *Turner v. Lee*, Cro. Car. 471, which case was decided principally, it

seems, on the ground that the statute only applied to cases where the executor had no remedy previously at the common law by action of debt, &c., which in this case he had. But this ground for the decision cannot be supported. See *Prescott v. Boucher*, 3 B. & Ad. 849.

(g) *Per Tentenden, C. J.*, 3 B. & Ad. 859; *per Cur.*, *Renvin v. Watkin*.

(h) *Renvin v. Watkin*, M. 5 Geo. II. B. R. MS.

nor indeed "*tenant*" of the rent at all in the sense the word was used in the statute, and consequently that his executor could not distrain for arrears of rent accrued in the testator's lifetime. But this question is set at rest by the 3 & 4 Will. IV. c. 42, s. 37, which enables the executors or administrators of any lessor or landlord to distrain upon the lands demised, for any term or at will, for the arrear of rent due to such lessor or landlord in his lifetime, in like manner as such lessor or landlord might have done in his lifetime. By sect. 38, such arrears may be distrained for after the end of such term or lease at will, in the same manner as if such term or lease had not been ended; provided that such distress be made within six calendar months after the determination of such term or lease, and during the continuance of the possession of the tenant from whom such arrears are due. Provided also, that all the powers and provisions in the several statutes made relating to distresses for rent shall be applicable to the distresses so made.

By sect. 3 of 32 Hen. VIII. c. 37,—Husbands seised in right of their wives, in fee, tail, or for life, of any rents or fee-farms, may distrain, after the death of their wives, for arrears during their wives' lifetime. And by sect. 4,—Tenants *pur auter vie* of rents and fee-farms, and their personal representatives, may distrain on the land charged after the death of the *cestui que vie*, for arrears due in the lifetime of the *cestui que vie*.

Where the testator had given the defendant authority to distrain, but died before the distress was taken, and afterwards it was taken in the name of the testator, and his executrix before probate recognized and adopted the defendant's act; it was held, that the defendant might make cognizance as the bailiff of the executrix (*i*).

One entitled to the separate herbage and feeding of a close, for a certain time, may distrain cattle belonging to the owner of the close, damage feasant there during that time (*k*). If a terre-tenant, holding under two tenants in common, pay the whole rent to one, after notice from the other not to pay it, the tenant in common who gave the notice may distrain for his share (*l*). One tenant in common may take a distress without his companions, and avow solely (*m*). Grant of rent to testator for years, with a clause of distress, that the grantee and *his heir* may distrain. Adjudged, that the executor should distrain, and not the heir (*n*).

A mortgagee, after giving notice of the mortgage to the tenant in possession, is entitled to such rent as shall be in arrear at the time of the notice, and to the rent which accrues afterwards, and may distrain for the same after such notice, if the lease under which the

(*i*) *Whitehead v. Taylor*, 10 A. & E. 210.

(*k*) *Burt v. Moor*, 5 T. R. 329.

(*l*) *Harrison v. Barnby*, 5 T. R. 246.

See *Doe v. Hamilton*, 13 Q. B. per Erle, J.

(*m*) *Willis v. Fletcher*, Cro. Eliz. 530.

(*n*) *Darrel v. Wilson*, Cro. Eliz. 645.

tenant holds be *before* the mortgage (*o*). But where the lease is made by the mortgagor alone *after* the mortgage, and no new tenancy has been created between the mortgagee and tenant, the mortgagee has no remedy but by ejectment, and cannot distrain (*p*). Nor will a mere recognition on the part of the mortgagee of the tenant in possession as his tenant enable him to distrain; there must be a mutual agreement; since "the relation of landlord and tenant cannot be created without the consent of both parties" (*q*). But a continuance in possession by the tenant after notice from the mortgagee, and payment or tender of rent by the tenant to the mortgagee, is, it seems, evidence of an assent to continue the tenancy on the old terms (*r*). *Secus*, if such payment be made by the tenant to the mortgagee under an authority from the mortgagor (*s*). If a lessor, having mortgaged his reversion, is permitted by the mortgagee to continue in receipt of the rent incident to that reversion, he, during such permission, is *presumptione juris* authorized, if it should become necessary, to realize the rent by distress, and to distrain for it in the mortgagee's name and as his bailiff (*t*). So when a mortgage has been paid off by the assignee of the equity of redemption, who has taken from the mortgagee an undertaking to execute a reassignment of the mortgage, and has obtained his authority to receive the rest, the assignee has an implied authority to distrain in the name of the mortgagee (*u*).

If by a custom the lord is precluded from turning cattle on the common during a certain season of the year, a commoner may distrain the lord's cattle which are turned on during that time (*x*). Wherever there is a colour of right for turning cattle on a common, a commoner cannot distrain, because it would be judging for himself in a cause which depends on a more competent inquiry. Hence, where the right of common was for two sheep for every acre of land in the possession of each commoner, it was held, that one commoner could not distrain the sheep of another for a surcharge (*y*). But where cattle are turned on the common without any colour or pretence of right, as by a stranger, a commoner may distrain them (*z*). The general rule, however, that one commoner cannot distrain the cattle of another, may be superseded by a special agreement; as, where A. being possessed of a quantity of land in a common field, and having a right of common over the whole field, and B. having a right of common over the whole field, they entered into an agreement not to exercise their respective rights for a certain term of years, and each party covenanted to that effect, and during the term the cattle of B. came upon the land

(*o*) *Moss v. Gallimore*, Doug. 279.

(*p*) *Evans v. Elliott*, 9 A. & E. 342.

(*q*) *Brown v. Storey*, 1 M. & G. 117.

(*r*) *Ibid.*

(*s*) *Wheeler v. Branscombe*, 5 Q. B. 373.

(*t*) *Trent v. Hunt*, 9 Exch. 14.

(*u*) *Snell v. Finch*, 13 C. B. (N. S.) 651; 32 L. J., C. P. 117.

(*x*) 1 Roll. Abr. 405 (A) pl. 6.

(*y*) *Hall v. Hardi ng*, Burr. 2427.

(*z*) *Ibid.*

of A. :—it was held, that A. might distrain them damage feasant, for, by the operation of the agreement, B. stood in the situation of a stranger with regard to A. (a).

A tenant holding over after the expiration of his term, cannot distrain the landlord's cattle, which were put on the land by the landlord for the purpose of taking possession (b). Lessee for years assigns his term, reserving a rent; he cannot distrain for such rent arrear at common law, because he has not any reversion; nor can he distrain for it under 4 Geo. II. c. 28, s. 5, as a rent-seck, because a rent-seck cannot issue out of a term of years (c). So if termor lease for the remainder of the term (d). In such cases an action of debt is maintainable (e), or assumpsit, for use and occupation (f). A tenant from year to year, under-letting from year to year, has a sufficient reversion entitling him to distrain (g). Although receivers appointed by the Court of Chancery have a power, where necessary, to distrain for rent, and need not apply first to the court for a particular order for that purpose (h), yet an authority to tenants to pay rent to J. S., whose receipt shall be their discharge, does not entitle J. S. to distrain (i).

In case of the goods of a tenant, from whom rent is in arrear, being taken in execution under a warrant from a county court, the bailiff of the county court is directed by 19 & 20 Vict. c. 108, s. 75, upon notice from the landlord, within five days from the seizure or before the goods are removed, to distrain for the rent claimed and the costs of the distress, and out of the proceeds of the sale satisfy, 1. The costs of the sale. 2. The landlord's claim, not exceeding one year's rent in any case. 3. The execution creditor, rendering the overplus to the execution debtor. This section does not authorize the bailiff to distrain the goods of a stranger which are upon the premises (k).

V. Of the Time at which a Distress may be taken.

As rent is not due until the last minute of the natural day, on which it is reserved, it follows that a distress for rent arrear cannot be made on that day (l). "One cannot distrain the same day the rent grows due, but it must be the day after." Sir M. Hale, MS. cited Hargr. n. 6, 1 Inst. 47, b. At the common law, therefore, if a lease was made at Michaelmas for a year, reserving rent at

(a) *Whiteman v. King*, 2 H. Bl. 4.

(b) *Taunton v. Costar*, 7 T. R. 431.

(c) ——— v. *Cooper*, 2 Wils. 375;
Parmenter v. Webber, 2 Moore, 656.

(d) *Preece v. Corrie*, 5 Bingh. 24;

Pascoe v. Pascoe, 3 B. N. C. 905.

(e) *Newcomb v. Harvey*, Carth. 161.

(f) *Pollock v. Stacey*, 9 Q. B. 1033.

(g) *Curtis v. Wheeler*, 1 M. & Malk. 493.

(h) *Bennett v. Robins*, 5 C. & P. 379.

(i) *Ward v. Shew*, 9 Bingh. 608;
Wheeler v. Branscombe, *supra*.

(k) *Beard v. Knight*, 27 L. J. Q. B. 359.

(l) *Duppa v. Mayo*, 1 Saund. 282.

Lady-day and Michaelmas, the lessor was deprived of his remedy by distress for the rent due at Michaelmas; because he could not distrain after the expiration of the term (*m*), though the tenant continued in occupation, and the rent was due before (*n*). But by 8 Ann. c. 14, ss. 6, 7,—Any person having any rent in arrear upon any lease for life or lives, or for years, or at will, may distrain for such arrears within six calendar months after the determination of the lease, and during the continuance of such landlord's title or interest, and during the possession of the tenant from whom the arrears are due. Although this proviso is in terms confined to the possession of the tenant, yet it has been held, that where the tenant dies before the term expires, and his personal representative continues in possession during the remainder, and after the expiration of the term, the landlord may distrain within six calendar months after the end of the term for rent due for the whole term (*o*), but then the tenancy must not be determined by the death of the lessee; and in case of a tenancy at will determined by the death of the tenant, the landlord could not distrain on the demised premises under ss. 6 & 7 (*p*). So where a tenant, by permission of the landlord, remained in possession of part of a farm after the expiration of the tenancy, it was held, that the landlord might distrain on that part within six calendar months after the expiration of the tenancy; for the operation of the statute is not confined to cases of a tortious holding, or to a holding of the whole (*q*). In *Beavan v. Delahay*, 1 H. Bl. 5, it was held, that the term was continued by the custom of the country, for the purpose of giving a right to the landlord to distrain on the premises in which the waygoing crop remained (*r*). "The statute of Anne applies only to cases in which the tenancy has been determined by lapse of time, or perhaps by notice to quit, and not to cases where it has been put an end to by the tenant's own wrongful disclaimer." *Per Patteson*, J. (*s*). And "to make the statute applicable, there must be a keeping as the party's own, to the exclusion of other people." Hence, where the tenant of a farm having remained a few days after the expiration of his term, and after entry by a new tenant went away, leaving a cow and some pigs, but not giving any further intimation of a purpose to return, or to continue holding any part of the farm; it was held, that the landlord could not justify distraining the goods so left for rent arrear, under the statute (*t*). But a termor who has underlet to a tenant cannot distrain after the expiration of his interest (*u*).

A distress for rent arrear can be taken only during the day-

(*m*) 1 Inst. 47, b.

(*n*) *Williams v. Stiven*, 9 Q. B. 14.

(*o*) *Braithwaite v. Cooksey*, 1 H. Bl. 465.

(*p*) *Turner v. Barnes*, 2 B. & S. 435.

(*q*) *Nuttall v. Stanton*, 4 B. & C. 51.

(*r*) *Griffiths v. Puleston*, 13 M. & W. 358, acc.

(*s*) *Doe v. Williams*, 7 C. & P. 323.

(*t*) *Taylorson v. Peters*, 7 A. & E. 110.

(*u*) *Burne v. Richardson*, 4 Taunt. 718.

time (x). "Before sun-rising or after sun-set no man may distrain but for damage feasant" (y). And this is in order to give the tenant an opportunity of preventing the distress by tendering the rent (z). But cattle damage feasant may be distrained not only in the day-time, but during the night also; otherwise they might escape (a).

By 3 & 4 Will. IV. c. 27, s. 2, distresses for the recovery of any rent may be made at any time within twenty years next after the time at which the right to make such distress shall have first accrued. But this section does not apply to rents reserved on leases for years, but only to rents existing as an inheritance distinct from the land, and for which before the statute an assize would have lain (b). By the 42nd section no arrears of rent can be recovered by distress for more than six years. See "Debt for Rent Arrear," *Statute of Limitations*.

Rent (whether the demise be by parol or deed) is a debt of equal degree with a debt by specialty (c). The mere giving of a promissory note, as it constitutes a debt of an inferior degree, cannot before payment extinguish a claim for rent; nor does the receipt of such note of itself suspend the *right* of distraining (d). "The cases in which the giving of the bill has been held not to suspend the remedy on a demand by specialty or for rent may be accounted for on the ground, that the legal implication of an assent that the bill shall operate as a conditional payment does not arise, when, if it did, the plaintiff would be deprived of a better remedy than an action on a bill, as in *Davis v. Gyde*, in which, the debt being for rent, the plaintiff would part with a remedy by distress." *Per Maule, J.* (e). But a right of distress may be postponed by express agreement (f).

VI. Of the Place where a Distress may be taken.

A distress for rent-service may be taken on any part of the land holden: so for a rent charged or reserved upon a lease upon any part of the land out of which the rent issues. And if a house be upon the land demised or charged, a distress may be taken in the house, if the outer door be open (g). So it may be through the

(x) 1 Inst. 142, a.; see *Tutton v. Darke*; *Nixon v. Freeman*, 5 H. & N. 647; 29 L. J., Ex. 271.

(y) *Mirroure*, c. 2, s. 26. See also 7 Rep. 7, a, that a distress for rent or service cannot be taken in the night. See 6 C. & P. 213, *Aldenburgh v. Peaple*, where *Parke, J.*, ruled that no one had a right to make a distress after dark.

(z) 8 Rep. 147.

(a) 1 Inst. 142 a.

(b) *Grant v. Ellis*, 9 M. & W. 113.

(c) *Gage v. Acton*, 1 Salk. 326.

(d) *Davis v. Gyde*, 2 A. & E. 623.

(e) *Belshaw v. Bush*, 11 C. B. 206.

(f) *Giles v. Spencer*, 26 L. J., C. P. 237.

(g) 1 Roll. Abr. 671 (M.) pl. 1.

doors or windows (*h*). "If an outward door be open, an inner door may be broken in order to take a distress" (*i*). "But a padlock put on a barn door cannot be opened by force for the purpose of distraining the corn;" *per* Lord *Hardwicke*, C. J., nor a stable, if locked (*k*). So gates or inclosures cannot be broken open or thrown down to take a distress (*l*), nor can the entry be made through a window fastened by a hasp (*m*), nor by breaking a window (*n*); but it is not illegal to climb over a fence, and so gaining access to the house by an open door (*o*). Where a distress has been once legally made, and the man in possession quits the house for a temporary purpose, as to take refreshment, he may, if he is refused admittance on his return, break open a door (*p*). For a rent-service or rent-charge issuing out of land, which lies in different counties, a distress for the whole may be taken in one county (*q*). So if a rent-charge issue out of land in the possession of many tenants, a distress may be taken upon the possession of one for the whole rent, for it issues out of each part (*r*). But where there are separate and distinct demises, there must be separate distresses on the several premises subject to the distinct rents, although the several premises are demised to the same tenant and by the same deed (*s*). By 11 Geo. II. c. 19, s. 8,—The landlord may distrain any cattle or stock of the tenant, depasturing on any common appendant or appurtenant, or any way belonging to the premises demised. If the lord come to distrain cattle which he sees then within his fee, and the tenant or any person, to prevent the lord from distraining, drive the cattle out of the lord's fee into some other place, yet may the lord freshly follow and distrain the cattle; for in judgment of law the distress will be considered as taken within his fee (*t*). A different rule holds with respect to distresses for damage feasant; for if the owner of the beasts chase them out of the soil, even with a view to evade the distress, yet the owner of the soil cannot distrain them; because the beasts must be damage feasant at the time of the distress (*u*).

By 11 Geo. II. c. 19, s. 1 (*x*),—If any lessee, for life, years, will or otherwise, of lands or tenements, upon the demise whereof any

(*h*) Com. Dig. tit. Distress (A. 3).

(*i*) *Per* Lord *Hardwicke*, C. J., in *Browning v. Dann*, Ca. Temp. Hardw. 168.

(*k*) *Brown v. Glenn*, 16 Q. B. 254.

(*l*) 1 Inst. 161, a. See 11 Geo. II. c. 19, s. 7, *post*, p. 601.

(*m*) *Hancock v. Austin*, 14 C. B. (N. S.) 634; 32 L. J., C. P. 252.

(*n*) *Attack v. Bramwell*, 3 B. & S. 520.

(*o*) *Eldridge v. Stacey*, 15 C. B. (N. S.) 458.

(*p*) *Bannister v. Hyde*, 2 E. & E. 627.

(*q*) 1 Roll. Abr. 671 (M.) pl. 10, 11.

(*r*) 1 Roll. Abr. 671 (M.) pl. 12.

(*s*) *Rogers v. Birkmire*, Str. 1040. A

joint distress, however, under several warrants is not, it seems *void*, if one of the warrants be good; *Governors of Bristol Poor v. Wait*, 1 A. & E. 264; although the distrainer might be liable for an excessive distress; *S. C.*; or in trespass, *Lamont v. Southall*, 5 M. & W. 416.

(*t*) 1 Inst. 161, a.

(*u*) *Ibid*.

(*x*) This section is the same as sect. 2 of 8 Ann. c. 14, except as to the time allowed for the seizing of the goods after the carrying off; the statute of Anne allowed only five; this statute allows thirty days.

rent is reserved, shall fraudulently or clandestinely carry off *his* goods from such demised premises, to prevent a distress, the lessor, or any person empowered by him, may, within thirty days after the carrying off, distrain *such* goods, wherever found, for the rent arrear, and sell or dispose of the same, as if distrained on the premises: provided (sect. 2), such goods have not been sold *bonâ fide* and for a valuable consideration, before the seizure, "*to a person not privy to the fraud*" (y).

The rent must be due, for the landlord cannot distrain under this statute *before* the rent becomes due (z); although he may *on* the day it becomes due (a). The words are "fraudulently or clandestinely." Where, therefore, a tenant removed his goods in open day, giving notice to his landlord, it was held, that although the removal was not clandestine, yet if it was fraudulent the case was within the statute (b). Although the removal be admitted to be with a view to avoid a distress, yet it is a question for the jury whether it is fraudulent or not (c). The mere removal is not of itself, it seems, sufficient (d). The statute does not apply to cases where the lessor has parted with his reversion (e); and it applies to the goods of the tenant only, and not to those of a stranger (f) or lodger (g); but it is sufficient in a plea to state that the goods were the tenant's, and it is not necessary to negative the proviso as to *bonâ fide* purchasers (h).

By sect. 7,—Any place, in which goods or chattels, fraudulently or clandestinely conveyed away, are locked up or secured, so as to prevent the same from being taken as a distress for rent arrear, may be broken open and entered in the day time by the party distraining; first calling to his assistance the constable or other peace-officer of the place where the goods are suspected to be concealed; and in case of a dwelling-house, oath being first made before a justice of the peace of a reasonable ground to suspect that such goods are therein; and such goods may be taken and seized, for the arrears of rent, as if they had been in an open place. It is not necessary that a lessor seizing goods under this section should be assisted by an ordinary peace officer, a special constable appointed for the occasion is sufficient (i). Nor is it necessary that any notice should be given or request made to the owner of the premises, whereon the goods are, before proceeding to break them open (k); but the presence of a peace officer, when the breaking open took place, must be both averred in the plea and proved (l).

(y) This section is copied from the 3rd of the 8 Ann. c. 14, with the exception of the words in inverted commas.

(z) *Rand v. Vaughan*, 1 B. N. C. 767.

(a) *Dibble v. Bowater*, 2 E. & B. 564.

(b) *Opperman v. Smith*, 4 D. & R. 33.

(c) *John v. Jenkins*, 1 C. & M. 227.

(d) *Parry v. Duncan*, 7 Bingh. 243.

(e) *Ashmore v. Hardy*, 7 C. & P. 501.

(f) *Thornton v. Adams*, 5 M. & S. 38.

(g) *Postman v. Harrell*, 6 C. & P. 225.

(h) *Williams v. Roberts*, 7 Exch. 618.

(i) *Cartwright v. Smith*, 1 M. & Rob. 284.

(k) *Williams v. Roberts*, 7 Exch. 618.

(l) *Rich v. Woolley*, 7 Bingh. 651.

VII. *The manner of disposing of Distresses, and herein of the Sale of Distresses for Rent Arrear.*

At the common law, the party distraining might have driven the distress from the place where it was taken, into any other place, even in a distant county. It is obvious, that the exercise of such a power must have been attended with great oppression; more especially, as the tenant was obliged to provide sustenance for his beasts, if they were impounded in an open pound; and the beasts being driven into another county, the tenant must frequently have been at a loss where to make replevin (*m*). A partial remedy for this evil was afforded by the 52 Hen. III. c. 4, which prohibited all persons from driving the distress out of the county where it was taken. But the 1 & 2 Phil. & M. c. 12, has given a further check to it. By this statute it is enacted,—“That no distress of cattle shall be driven out of the hundred, rape, wapentake, or lathe, where the distress is taken, except it be to a pound overt within the same shire, not above three miles distant from the place where the distress is taken; and no cattle or other goods distrained for any manner of cause, at one time, shall be impounded in several places, upon pain of forfeiting, to the party grieved, one hundred shillings and treble damages.” If the hundred, in which the cattle are distrained, be in one county, and the hundred into which they are driven be in another, the venue may be laid in either county (*n*). Impounding in another county does not make the distrainer a trespasser, though it subjects him to the above penalty (*o*). Where lands in adjoining counties are let upon one demise, the cattle may be taken to a pound in either county, but they cannot be driven through an intermediate county, if the counties do not adjoin (*p*).

Persons distraining for rent arrear may impound or “otherwise secure” the distress in such part of the land chargeable with the rent, “as shall be *most* fit and convenient,” 11 Geo. II. c. 19, s. 10. Where the distrainer put his hand upon a bullock in an open field, and then made a list of twenty cattle, which he delivered to the tenant, leaving a man in possession, and the next morning delivered a notice stating that he had distrained the twenty cattle, and had “impounded them upon the premises,” it was held that there was a sufficient impounding, or at all events, “securing,” under the statute (*q*). Strictly speaking, the distrainer in a dwelling-house ought to select one room, and that the most convenient room (*r*), and impound the goods therein, or remove them; but very slight evidence of consent by the distrainee, that they may remain as they

(*m*) 2 Inst. 106.

(*n*) *Pope v. Davis*, 2 Taunt. 252.

(*o*) *Gimbart v. Pelah*, 2 Str. 1272.

(*p*) *Walter v. Rumball*, 1d. Raym. 53.

(*q*) *Thomas v. Harries*, 1 M. & G. 695.
See *post*, tit. “Replevin”—“Tender of Arrears.”

(*r*) *Woods v. Durrant*, 16 M. & W. 149.

were, is sufficient, *e. g.* an admission by the distrainee that the distrainor "had acted like a gentleman" (s). So where the distrainee thanked the distrainor for the mode in which the distress had been conducted (t). A cottage may be locked up so as to exclude the tenant altogether, if necessary to secure the distress (u). Section 8, which empowers the landlord to seize growing crops as a distress, authorises him to cut, gather and lay up the same, when ripe, in barns, or other proper places on the premises, if any; if not, then in other barns or proper places, as near as may be to the premises. Provided (sect. 9) that notice of the place where the goods are deposited be given to, or left at the last place of abode of, the tenant, within one week after the lodging of the distress.

By 5 & 6 Will. IV. c. 59, s. 4, parties impounding cattle are required to provide sufficient food for them, and may then recover before a justice of the peace not exceeding double the value of such food from the owner, or may, *if necessary*, after seven days, sell the distress and recoup themselves the value of the food supplied, rendering the overplus to the owner (x). By sect. 5, where animals have been impounded without sufficient food for more than twenty-four hours, any person may enter the pound and supply them with food, without being liable to an action of trespass or other proceeding.

Distrainers are bound to see that the pound to which they take the distress is in a fit and proper state to receive it, at the time of impounding. It is no defence for abusing the distress by putting the animals distrained in a muddy pound, that the place was the manor-pound, and was *generally* in a proper state (y); and if the usual pound is in unfit state, the distrainor should find another (z).

Sale of Distress for Rent Arrear.—At the common law, distresses for rent arrear could not be sold, but only detained as pledges for enforcing the payment of such rent; but by the 2 W. & M. sess. 1, c. 5, s. 2, it is enacted, that—Where any *goods or chattels*, (see *post*, p. 606) shall be distrained for any *rent* reserved and due upon any demise, and the tenant or owner of the goods shall not *within* five days next after such distress, and *notice thereof*, with the cause of such taking, left at the chief mansion-house or other most notorious place on the premises charged with the rent, replevy the same, the person distraining may, with the sheriff or under-sheriff of the county, or constable of the hundred, parish, or place, where the distress is taken, cause the distress to be appraised by *two sworn* appraisers, whom such sheriff, &c. shall swear to appraise them truly, and after such appraisement, may sell the same towards satisfaction of the rent, and the charges of the distress,

(s) *Washborn v. Black*, 11 East, 405.

(t) *Tennant v. Field*, 27 L. J., Q. B. 33.

(u) *Woods v. Durrant*, 16 M. & W. 149.

(x) See *Layton v. Hurry*, 8 Q. B. 811.

(y) *Wilder v. Speer*, 8 A. & E. 547.

(z) *Bignell v. Clarke*, 5 H. & N. 485.

appraisement and sale, leaving the overplus, if any, in the hands of the sheriff, &c. for the owner's use.

"This statute does not affect distresses damage feasant; consequently they remain, as they were at common law, mere pledges; and the sale of them will make the party distraining a trespasser *ab initio*." *Per Lord Hardwicke, C. J. (a)*. The five days are reckoned exclusive of the day of distress and day of sale (*b*); and a reasonable time after the expiration of the five days is allowed to the landlord for appraising and selling the goods (*c*). But if goods remain on the premises after the expiration of that time without the tenant's consent (*d*), the distrainer becomes a trespasser (*e*); although for the mere retention of the goods, he is not liable, at least in trespass (*f*), although he may be in trover. Goods assigned to the defendant by a bill of sale, but remaining in the assignor's possession, were distrained for rent, and duly appraised, and the landlord, instead of selling them, took them at the appraised price in satisfaction of the rent and charges, and then gave them to the plaintiff; the defendant having followed and seized them, it was held that there had been no sale under the statute 2 W. & M. sess. 1, c. 5, s. 2, and therefore the property remained in the defendant, notwithstanding the statute 11 Geo. II. c. 19, s. 19, and that he was justified in seizing them (*g*).

The notice must be in writing (*h*), and sufficiently certain to inform the tenant or the person whose effects are taken, by expressing what are the goods taken, and also what is the amount of the rent in arrear (*i*). The general description, "any other goods, chattels and effects on the premises, or in or about the premises, to pay the rent," &c., is sufficient, for that specifies and impounds *all* the chattels (*j*); but "all other goods, &c. that *may* be required in order to satisfy the above rent, &c." is insufficient, for that leaves it uncertain what goods are taken (*k*). It is not necessary to set forth in the notice at what time the rent became due (*l*). Nor does a wrong statement in the notice, of the person to whom the rent is due, vitiate the distress, if in fact at the time of entry the distrainer had authority to enter (*m*); for a party may distrain for rent and avow for fealty (*n*). So where the notice is for more than is actually due, but the goods distrained and sold only cover the real amount, there is, in the absence of special damage, no cause

(a) *Dorton v. Pickup*, Sittings after M. T. 9 Geo. II. MS.

(b) *Robinson v. Waddington*, 13 Q. B. 753.

(c) *Pitt v. Shew*, 4 B. & Ald. 208.

(d) See *Fisher v. Algar*, 2 C. & P. 374.

(e) *Griffin v. Scott*, 2 Ld. Raym. 1424; *Ladd v. Thomas*, 12 A. & E. 117, *per Lord Denman, C. J.*

(f) *West v. Nibbs*, 4 C. B. 172.

(g) *King v. England*, 4 B. & S. 782; 33 L. J., Q. B. 145.

(h) *Wilson v. Nightingale*, 8 Q. B. 1034.

(i) This is not necessary at common law. *Per Parke, B., Tancred v. Leyland*, 16 Q. B. 669.

(j) *Wakeman v. Lindsey*, 14 Q. B. 625.

(k) *Kerby v. Harding*, 6 Exch. 234.

(l) *Moss v. Gallimore*, Doug. 280.

(m) *Trent v. Hunt*, 9 Exch. 14.

(n) *Gwinnett v. Phillips*, 3 T. R. 645, *per Lord Kenyon, C. J.*

of action (*o*); nor does it make any difference that it was done "maliciously," for an act which does not amount to a legal injury cannot be actionable, because it is done with a bad intent (*p*). In *Walter v. Rumbal*, Ld. Raym. 53, it was held, that notice to the owner (who was not the tenant) was good notice under the act as against him; and that he could not object that no notice had been given to the tenant or left at the mansion-house, or most notorious place on the premises (*q*).

The appraisers must be sworn before the constable of the parish where the distress is taken; it will not suffice, if sworn before constable of adjoining parish (*r*); although the proper constable cannot be found. And the constable must attend with the appraisers at the time the goods are appraised, and must swear them before they make their appraisement (*s*). If the distress be taken in two counties, but impounded in one, the constable of the parish where the impounding takes place, is the proper person to swear the appraisers (*t*). The party distraining ought not to be sworn as one of the appraisers, for he is interested in the business (*u*). The appraisers must be reasonably competent, but need not be professional appraisers (*x*); and if the tenant dispenses with their employment, he cannot afterwards complain (*y*). In actions for selling goods distrained for rent, without appraisement, the measure of damages is the value of the goods sold, *minus* the rent due (*z*).

This statute, although it authorizes a sale after the five days, does not take away the right to replevy, after the five days, in case the distress is not sold; for it does not contain any negative words, and at common law the distress was at all times replevisable. *Secus* after a sale; for then the purchaser is entitled to take the goods and retain them (*a*).

A landlord is not, it seems, entitled at common law to sell crops distrained subject to a condition (in accordance with the custom of the country, or the express terms of the tenancy), that they shall be consumed on the farm, if, by so doing, they sell for less than they otherwise would have done (*b*). But as, by sect. 11 of 56 Geo. III. c. 50, assignees of the chattels, stock or crops of any person employed in husbandry, are forbidden from using or disposing of any such produce in any other way than the tenant might have done, it seems that the landlord would not, since that statute,

(*o*) *Tancred v. Leyland*, 16 Q. B. 669, overruling *Taylor v. Henniker*, 12 A. & E. 488.

(*p*) *Stevenson v. Newnham*, 13 C. B. 285.

(*q*) *Walter v. Rumbal*, Ld. Raym. 53.

See *Wilson v. Nightingale*, 8 Q. B. 1034.

(*r*) *Avenall v. Croker*, M. & Malk. 172.

(*s*) *Kenney v. May*, 1 M. & Rob. 56.

(*t*) *Walter v. Rumbal*, Ld. Raym. 53.

(*u*) *Andrews v. Russell*, Bull. N. P. 81 (5th ed.), adm. *Westwood v. Cowne*, 1 Sta. 172.

(*x*) *Roden v. Eyton*, 6 C. B. 427.

(*y*) *Bishop v. Bryant*, 6 C. & P. 484.

(*z*) *Knight v. Egerton*, 7 Exch. 407.

(*a*) *Jacob v. King*, 5 Taunt. 451.

(*b*) *Ridgway v. Lord Stafford*, 6 Exch. 404.

be liable for not selling the goods for the best price, if such a condition were imposed (c).

The overplus, which is to be handed to the sheriff for the owner's use, after satisfying the rent and charges, means the overplus after payment of the *reasonable* charges. Where the distrainer receives from the broker the overplus, and makes no objection as to the reasonableness of the charges, it is a question for the jury whether he accepted such balance in satisfaction or not, and if not, whether it was sufficient to satisfy the real balance after deducting the *reasonable* charges (d). If the distrainer hands over the overplus to a third party, no action for money had and received can be maintained against him (e). The remedy is by an action on the statute for not leaving the overplus with the sheriff (f).

By 11 Geo. II. c. 19, s. 10, any person lawfully taking any distress for any kind of rent may impound or otherwise secure the distress so made on the most fit and convenient part of the premises chargeable with the rent, and may appraise, sell, and dispose of the same *upon* the premises, in like manner and under the like directions and restraints as any person may do off the premises by virtue of the 2 W. & M. c. 5. The 1 & 2 P. & M. c. 12, s. 2, which enacts,—that no person shall take for keeping in pound, impounding or poundage of any distress, above 4*d.* for any one whole distress that shall be so impounded—does not extend to cases where goods are impounded under the foregoing section of the 11 Geo. II. c. 19 (g). An appraisalment on the premises under the last-mentioned section does not so change the property, that the tenant may not replevy them before an actual sale (h).

The sale of growing crops is not authorized by the 2 W. & M. c. 5, nor by the 11 Geo. II. c. 19, s. 8, till after appraisalment, and that cannot be made till they are ripe. Hence a tenant whose growing crops have been seized, as a distress for rent, *before* they were ripe, cannot maintain an action upon the case against the landlord for selling the same before the five days, or a reasonable time have elapsed, such sale being wholly void (i).

In order to prevent excessive charges by brokers and other persons employed to make distresses on poor tenants, it was enacted by 57 Geo. III. c. 93, s. 1, that no person making any distress for rent, where the sum due shall not exceed 20*l.*, shall take any other charges than those mentioned in the schedule annexed to the act, which are as follows:—

(c) *Wilmot v. Rose*, 3 E. & B. 563.

(d) *Lyon v. Tomkies*, 1 M. & W. 603.

(e) *Evans v. Wright*, 2 H. & N. 527.

(f) *Yates v. Eastwood*, 6 Exch. 805;
Evans v. Wright, 27 L. J., Ex. 50.

(g) *Child v. Chamberlain*, 5 B. & Ad.
1049.

(h) *Jacob v. King*, 5 Taunt. 451.

(i) *Owen v. Legh*, 3 B. & Ald. 470.

Levying distress	s.	d.
Man in possession, per day	3	0
Appraisement, where by <i>one</i> broker or more, 6 <i>d.</i> in the £ on the value of the goods.	2	6
Stamp, the lawful amount thereof.		
All expenses of advertisement, if any such	10	0
Catalogues, sale and commission, and delivery of goods, 1 <i>s.</i> in the £ on the net produce of the sale.		

This statute has not repealed the 2 W. & M. sess. 1, c. 5, s. 2 (*ante*, p. 603), so as to make an appraisement by *one* broker sufficient (*k*).

Under the 57 Geo. III. c. 93, parties aggrieved may apply to a J. P. See sections 2, 3, 4, and 5. But the sixth section is general, for by that—Every broker or other person making and levying *any* distress whatsoever, shall give a copy of his charges, and of all the costs and charges of any distress whatsoever, signed by him, to the person on whose goods the distress is levied, although the amount of rent demanded exceed 20*l.* This section only applies to persons *actually* interfering in making the distress, and therefore a landlord who does not personally interfere in the distress, is not liable for the neglect of the broker employed by him, in not delivering a copy of his charges (*l*). The provisions of the above statute have, by 7 & 8 Geo. IV. c. 17, been extended to distresses for land-tax, assessed taxes, rates, tithes, &c., for any sum not exceeding 20*l.*

VIII. Pound Breach and Rescue (*m*).

1. *Of Pound Breach*.—An action for a pound breach lies, where a person distrains cattle damage feasant in his land, or for rent or services, and puts them into the common pound, or into another pound or place, which shall be said to be a lawful pound, and the owner of the cattle or other person takes the cattle out of the pound, and drives them where he pleases (*n*). If a person sends his servant to distrain for rent or services, and the servant distrains the cattle, and impounds them, and a stranger takes them out of the pound, the action must be brought by the master and not by the servant: for it is the master's pound (*o*). If a person distrain cattle for damage feasant, and put them in the pound, and the owner, who *had common there*, make fresh suit, and find the door unlocked, he may justify the taking away the cattle. If

(*k*) *Allen v. Flicker*, 10 A. & E. 640.

(*l*) *Hart v. Leach*, 1 M. & W. 560.

(*m*) A summary remedy is given in cases of pound breach and rescue, where

cattle are taken *damage feasant*, by 6 & 7 Vict. c. 30.

(*n*) F. N. B. 100, a.

(*o*) F. N. B. 100, b.

the owner break the pound, and take away his goods, the party distraining may have his action for pound breach, and he may also take his goods that were distrained wheresoever he find them, and impound them again (*q*).

A pound-keeper is bound to receive everything offered to his custody, and is not answerable whether the thing were legally impounded or not. If the cattle be wrongfully taken, the person who brings the cattle is answerable, and not the pound-keeper, unless it can be proved that he has transgressed the limits of his duty, and assented to the trespass. When the cattle are once impounded, he cannot let them go without a replevin, or without the consent of the party. When the cattle are in the pound, they are in the custody of the law; and if the pound is broken, the pound-keeper cannot bring an action, but the person who distrained them (*r*).

2. *Of Rescue*.—Rescue, as far as the same relates to distress, means the taking away and setting at liberty, against law, a distress taken (*s*). Rescue lies, where a person distrains for rent or services, or for damage feasant, and is desirous of impounding the distress, and another person rescues the distress from him (*t*). The party distraining must be in possession of the distress, otherwise there cannot be a rescue. Although rescue will not lie at the suit of a person who is prevented by another from making a distress, yet an action on the case will lie for the disturbance (*u*). If a person send his servant to distrain, and rescue be made upon the servant, the action must be brought by the master who sustains the injury, and not by the servant (*x*). If a distress be taken without cause, as where rent is not due (*y*), the owner may make rescue before the distress is impounded (*z*). So, if the owner tender the rent before distress is taken (*a*). But, after the distress is impounded, the owner cannot break the pound, and take the distress out of the pound: for it is then in the custody of the law (*b*). Yet if a distrainer take the distress out of the pound for the purpose of making an unlawful use of it, the owner may retake his property without being liable for a rescue or pound breach (*c*).

The action of rescue has fallen into disuse; the usual remedy at this time is by an action on the case, under 2 W. & M. sess. 1, c. 5, s. 4, which enacts, that—Upon any pound breach, or rescue of

(*q*) 1 Inst. 47, b.

(*r*) *Badkin v. Powell*, Cowp. 476. See 2 W. & M. sess. 1, c. 5, *infra*.

(*s*) 1 Inst. 160, b.

(*t*) F. N. B. 101, a.

(*u*) *Ibid.* 102, b.

(*x*) F. N. B. 101, b.

(*y*) 1 Inst. 160, b.

(*z*) *Ibid.* 47, b.

(*a*) *Ibid.* 160, b.

(*b*) *Ibid.* 47, b.

(*c*) *Smith v. Wright*, 6 H. & W. 821; 30 L. J., Ex. 313.

goods or chattels distrained for rent, the party grieved shall, in a special action on the case, for the wrong thereby sustained, recover treble damages and costs against the offenders, or against the owners of the distress, in case the same be afterwards found to have come to their use or possession. The word treble refers to costs as well as damages (*d*). Formerly, proof of a tender of the rent after the impounding of distress, would not bar an action on this statute (*e*). The rule was stated then: "Tender upon the land before the distress (without the expenses (*f*)) makes the distress tortious; tender after the distress and before the impounding, makes the detainer and not the taking wrongful; tender after the impounding makes neither the one nor the other wrongful, for then it comes too late, because then the cause is put to the trial of the law to be there determined" (*g*). Now, however, upon the equity of the statute 2 W. & M. sess. 1, c. 5, s. 2, an action is maintainable if goods distrained for rent are sold after a tender made within the five days, though the tender have been made after the impounding (*h*). A plea of recaption upon a rescue must aver that the recaption was on fresh pursuit (*i*). An action under this section is not a penal one, so as to entitle the defendant to give the special matter in evidence under the general issue by virtue of 21 Jac. I. c. 4 (*j*).

IX. *Of abusing the Distress, and of Irregularity in the Proceedings by the Party Distraining.*

An abuse of the distress makes the party distraining a trespasser *ab initio*, except where it is otherwise provided by statute (*k*).

In trespass for breaking and entering the plaintiff's house, and taking and carrying away his goods, the defendant justified the taking and carrying away the goods, as a distress for damage feasant: replication, that after the distress, the defendant converted them to his own use: on demurrer, it was urged, that the replication was a departure; for it did not support the plaintiff's declaration in trespass, but showed rather that he ought to have brought trover on the conversion; but the court overruled the objection, observing, that he *who abuses a distress* is a trespasser *ab initio*, and, therefore, if in trespass, the defendant justifies *nomine districtionis*, the plaintiff may show an abuse, and it is not a departure, but will support the declaration: and so it does in this case; for the conversion is a trespass or trover at the plaintiff's election; and the matter disclosed in the replication makes

(*d*) *Lawson v. Story*, Ld. Raym. 19. See Gray on Costs, 182.

(*e*) *Ellis v. Taylor*, 8 M. & W. 415.

(*f*) *Bennett v. Hayes*, 5 H. & N. 391.

(*g*) 8 Rep. 147, a; *Singleton v. Williams*, 5 L. T. (N. S.) 644 Ex.; 7 H. &

N. 747.

(*h*) *Johnson v. Upham*, 28 L. J., Ex. 252, overruling *Ellis v. Taylor*, 8 M. & W. 415.

(*i*) *Rich v. Woolley*, 7 Bingh. 651.

(*j*) *Castleman v. Hicks*, Car. & M. 266.

(*k*) See the statutes, *infra*.

good his election; for it proves it a trespass as well as a trover (*l*). But where a landlord distrains for rent, amongst other things, goods which are not distrainable in law, and the tenant pays the amount of the rent and the costs of distress, upon which the distress is withdrawn altogether, the tenant is entitled, in an action of trespass, to recover only the actual damage sustained by the taking of those particular goods, and not the whole amount paid by him; and in such a case the distrainer is a trespasser *ab initio* only as to the goods which were not distrainable (*m*).

By 11 Geo. II. c. 19, s. 19—Where any distress shall be made for any rent justly due, and any irregularity or unlawful act shall be afterwards done by the party distraining, or his agent; the distress itself shall not be deemed unlawful, nor the distrainer a trespasser *ab initio*, but the party grieved may recover satisfaction for the special damage he has sustained *and no more* in an action of trespass, *or* on the case, at the election of the plaintiff; and if he recover, he shall have full costs.

In case for an irregular distress under the foregoing clause, it is necessary to state correctly to whom the rent distrained for is due (*n*). The section says the tenant shall recover for the damages he has sustained “and no more.” Where therefore no actual damage has been sustained no action can be maintained (*o*). Although the statute gives the option, yet the tenant must pursue the remedy proper under the circumstances (*p*); trespass, if the irregularity be in the nature of an act of trespass,—case, if it be in itself the subject-matter of an action on the case (*q*). Thus where the distrainer remained fifteen days on the premises, it was held, that he was liable in trespass, at all events for the removal of the goods (*r*), and, it would seem, for the remaining *on* the premises only (*s*). But where goods which had been fraudulently removed *off* the premises of the plaintiff were retained possession of by the defendant, after he had accepted the rent in arrear and the charges of the distress from the plaintiff, it was held, that the mere retaining possession of them was not a trespass (*t*). Note too, that in this case the goods had been already impounded. The tres-

(*l*) *Gargrave v. Smith*, Salk. 221; but in the case of a distress *for rent*, such a replication, since the 11 Geo. II. c. 19, would seem to be a departure.

(*m*) *Harvey v. Pocock*, 11 M. & W. 740.

(*n*) *Ireland v. Johnson*, 1 B. N. C. 162. But the rule is, that where an action is founded on a breach of duty, it is not necessary to state a contract at all. *Marshall v. York and Newcastle Railway*, 11 C. B. 655.

(*o*) *Rodgers v. Parker*, 18 C. B. 112.

(*p*) *Vertue v. Beasley*, 1 M. & Rob. 21.

(*q*) *Messing v. Kemble*, 2 Campb. 115.

(*r*) *Winterboirne v. Morgan*, 11 East, 394.

(*s*) *Per Denman, C. J., Ladd v. Thomas*, 12 A. & E. 126; *Evans v. Elliott*, 5 A. & E. 142; *Holmes v. Wilson*, 10 A. & E. 503; *Bowyer v. Cook*, 4 C. B. 236; but in the last two cases the original entry was a trespass, and it is clear that every continuation of an original trespass is a fresh trespass. *Evans v. Elliott* was a case of replevin.

(*t*) *West v. Nibbs*, 4 C. B. 172. See *Hartley v. Moxham*, 3 Q. B. 701.

pass may be waived, and case brought for the consequential damage by the removal, &c. of the goods (*u*); but this cannot be done if the injury is to the realty (*x*). "There is no doubt that, where there is a direct injury, and also a consequential damage, that may form the subject-matter either of case or trespass, but where there is a direct injury to the soil and freehold, there is no other remedy but trespass" (*y*). Where, however, a declaration states a wrong which is a trespass, it is sufficient, even though in point of form it be framed in case for the consequential injury (*z*). Since this statute trover will not lie for goods irregularly sold under a distress, if the whole (*a*), or any part (*b*) of the rent distrained be due at the time of seizure, "for the distress, being lawful, binds the property and takes the possession out of the plaintiff" (*c*). But trover lies against a landlord who has unjustifiably taken a second distress, although the rent is still due (*d*). By sect. 20 of the same statute, it is provided,—That no tenant or lessee shall recover in such action, if tender of amends be made before action brought.

By 17 Geo. II. c. 38, ss. 8 and 10, similar provisions are made with regard to distresses for poor rates, which also are not invalidated on account of any defect, &c. in the warrant of appointment of overseers, or in the rate of assessment, or in the warrant of distress.

A party making a distress for two causes, as to one of which he is justified, and entitled to notice of action, but as to the other not, is liable to trespass as to the other (*e*). Trespass lies against a landlord who, on making a distress for rent, turns the tenant's family out of possession, and continues in possession after the rent is paid (*f*). But trespass will not lie for an excessive distress merely (*g*). Plaintiff brought trespass for taking an excessive distress, and recovered; but on error, it was held, that trespass would not lie; the entry and distress being lawful, in part, for the rent due, and the whole being one act; and that it was not like the case where there was a subsequent abuse of the distress (*h*).

The proper remedy for an excessive distress is an action on the

(*u*) *Smith v. Goodwin*, 4 B. & Ad. 413; *Holland v. Bird*, 10 Bingh. 15; *Nargeth v. Nias*, 1 E. & E. 439.

(*x*) *Hudson v. Nicholson*, 5 M. & W. 437.

(*y*) *Weeton v. Woodcock*, 5 M. & W. 594, *per Parke*, B.

(*z*) *Hudson v. Nicholson*, 5 M. & W. 537.

(*a*) *Wallace v. King*, 1 H. Bl. 13.

(*b*) *Whitworth v. Smith*, 1 M. & Rob. 193.

(*c*) *Rodgers v. Parker*, 18 C. B. 124.

(*d*) *Dawson v. Cropp*, 1 C. B. 961.

(*e*) *Lamont v. Southall*, 5 M. & W. 416.

(*f*) *Eltherton v. Popplewell*, 1 East, 139.

(*g*) *Hutchins v. Chambers*, 1 Burr. 590, except as it seems where gold or silver are taken to an excess, apparent on the face of it: as where six ounces of gold and 100 ounces of silver were taken for 6s. 8d.; but that proceeds on the ground that gold and silver are of a certain and known value, and the measure of the value of other things.

(*h*) *Lynn v. Moody*, 2 Str. 851.

case, founded on the statute of Marlbridge, 52 Hen. III. c. 4, which provides, "that distresses shall be reasonable," and that persons "taking unreasonable distresses shall be grievously amerced for the excess of such distresses." But a mere claim of more than is due does not vitiate the distress, and no action lies, in the absence of special damage, unless there is a seizure or sale of more of the goods taken than is sufficient to raise the amount of rent really due, with legal charges (*i*), in which case a plaintiff would be entitled to a verdict with nominal damages, although he should fail to prove any actual damage (*k*). And for this there should be a count applicable, although perhaps the fact of seizure and sale for more rent than was due may be given in evidence under the common count for an excessive distress (*l*). The landlord is not bound to calculate very nicely the value of the property seized; he ought, however, to take care that some proportion is kept between that and the sum for which he is entitled to take it (*m*), and must exercise a reasonable and honest discretion in so doing (*n*). To determine whether a distress be excessive, it must be ascertained what the goods seized would have sold for at a broker's sale (*o*). It is no objection that the excess consists in seizing growing crops, if their probable produce is capable of being estimated at the time of seizure, but the measure of damages in such a case is not the value of the crops, but the inconvenience and expense which the tenant sustains in being deprived of the management of them, or in procuring sureties to a larger amount than he would otherwise have had to provide (*p*). A third party whose goods are taken may maintain this action (*q*). Thus, where the goods of a tenant lodger were distrained along with the tenant's, and sold first, after notice from the lodger, and the tenant's goods were sufficient to satisfy the distress and charges, it was held, that the lodger was entitled to sue for an excessive distress (*r*). It is no bar to such an action, that between the distress and sale the parties came to an arrangement respecting the sale (*s*). But the action cannot be maintained after a judgment recovered in replevin (*t*). Where the plaintiff has received the taxed costs of his replevin on the distress, he cannot, in the action for excessive distress, recover as damages the extra costs incurred by the replevin (*u*).

If there has been some mistake as to the value of the goods,

(*i*) *Glynn v. Thomas*, 11 Exch. 870;

French v. Phillips, 1 H. & N. 564.

(*k*) *Chandler v. Doulton*, 3 H. & C. 553; 34 L. J., Ex. 89.

(*l*) *Lucas v. Tarterton*, 27 L. J., Exch. 246.

(*m*) *Per Bayley, J., Willoughby v. Backhouse*, 2 B. & C. 823.

(*n*) *Roden v. Eyton*, 6 C. B. 427.

(*o*) *Per Parke, B., in Wells v. Moody*,

7 C. & P. 59.

(*p*) *Piggott v. Birtles*, 1 M. & W. 441.

(*q*) *Fisher v. Algar*, 2 C. & P. 374.

(*r*) *Wilkinson v. Ibbett*, 2 F. & F. 300, *per Martin, B.*

(*s*) *Sells v. Hoare*, 1 Bingh. 401; *Willoughby v. Backhouse*, 2 B. & C. 821.

(*t*) *Phillips v. Berryman*, Trin. 23 Geo. III. B. R. MS.

(*u*) *Grace v. Morgan*, 2 B. N. C. 534.

and the landlord fairly supposes the distress to be of the proper value at the time of levying the first distress, and he afterwards finds it to be insufficient, he may then distrain for the remainder; or if the tenant has done anything equivalent to saying, "forbear to distrain now, and postpone your distress to some other time." In such cases the landlord may distrain a second time. But if there be a fair opportunity, and there is no lawful or legal cause why he should not work out the payment of the rent by reason of the first distress, his duty is to work it out by the first and he cannot distrain again (x). Where the distrainee, by his own wrongful act, prevented the distress from having its proper operation, as by forcibly preventing the purchaser of a rick, which had been distrained and sold, from taking possession of it, it was held that a second distress was justifiable (y).

(x) *Bagge v. Mawby*, 8 Exch. 649.

(y) *Lee v. Cooke*, 27 L. J., Exch. 337.

CHAPTER XVIII.

EJECTMENT.

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I. *Of the Nature of the Action of Ejectment.*

AN ejectment is a possessory action, and is the ordinary method by which the title to lands and tenements is tried and the posses-

sion recovered (a) in all cases where the party claiming title has a right of entry; whether such title be to an estate in fee, fee tail, for life, or for years. From this description it should seem that, in strictness, this action could be maintained for the recovery of that species of property only, whereon an entry can be made. But it will be found that, in a few instances, which will be more particularly mentioned hereafter, this action has been extended beyond these limits.

After the disuse of real actions (b), questions of title to land were usually tried in actions of replevin or trespass *quare clausum fregit*; and this practice continued, until the method of trying titles by the action of *ejectio firmæ* was introduced (c). This action was commenced (without any writ) by a declaration, which alleged a lease for a given number of years from the real claimant to a nominal plaintiff (generally styled John Doe), an entry on the land by the nominal plaintiff under the lease, and his subsequent ouster by a nominal defendant (generally styled Richard Roe); and at the foot of such declaration was a notice addressed to the real tenants in possession, warning them that unless they appeared and defended the action within a specified time, they (the real tenants) would be turned out of possession. It need scarcely be said that the lease to John Doe, his entry on the land, and his ouster by Richard Roe, were pure fictions, but the tenant in possession was not permitted by the courts to defend the action and get his name substituted for that of the nominal defendant Richard Roe (who was styled "the casual ejector"), without entering into what was called "the consent rule," by which he bound himself to admit the alleged lease, entry and ouster, and to insist at the trial on the title only; the question at which accordingly was, whether the real claimant, on the day of the alleged demise, was entitled to demise the property, *i. e.*, whether he was then legally entitled to actual possession or not. In this action, however, being originally a personal one, damages only could be recovered until some time between the 6th Ric. II. and 7th Edw. IV., about which time it appears, from the Year-book of 7 Edw. IV., fol. 6, that it had been resolved by the judges that the term, as well as damages, might be recovered (d). In consequence of this determination the

(a) In trespass *quare clausum fregit*, trover, and other forms of action, the title to land may come in question and be decided, but in them damages alone can be recovered. Cole on Ejectment, 63.

(b) By 3 & 4 Will. IV. c. 27, s. 36, all real and mixed actions, (except a writ of right of dower, or writ of dower *unde nil habet*, or a *quare impedit*, or an ejectment,) and plaints in the nature of any such writ or action, (except a plaint for freebench or dower,) were abolished.

(c) In the conclusion of *Alden's case*,

43 Eliz., 5 Rep. 105, b., Sir E. Coke has remarked, that titles of land were at that day for the most part tried in actions of *ejectio firmæ*.

(d) "Until the end of Edw. IV. the possession was not recovered in an *ejectio firmæ*, but only damages." Hale's H. C. L. by Runnington, Serjt. ed. 1820, p. 201. See further, on this subject, a very learned and elaborate note by the reporters in *Doe v. Errington*, 1 A. & E. 756, n. I am not aware of any judgment for the recovery of the term prior to that in *East. T.*

action became in its nature a mixed one, *i. e.*, a *real* one in respect of the recovery of the land, and a personal one in respect of the recovery of damages. The damages, however, were merely nominal, the land being the real subject matter of dispute and the law having provided another remedy for the injury sustained by the claimant in being kept out of possession from the time when his title accrued, to the time of recovering possession in the ejectment, *viz.*, by an action of trespass for mesne profits; for a further account of which, see *post*, Sect. XIII.

The practical procedure in ejectment has been entirely remodelled by the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76), ss. 168 to 221. The above-mentioned fictions are wholly abolished. No damages are now recoverable, except in cases between landlord and tenant, under the provisions of sect. 214, and this at the option of the landlord (*e*). The action is commenced by a writ issued by the claimant, and directed to the persons in possession (either by themselves or by their servants (*f*)) by name, and to all persons entitled to defend the possession of the property claimed, describing it with reasonable certainty (*g*), and containing a notice that in default of appearance (within sixteen days) judgment may be signed and the parties named in the writ turned out of possession. By sects 172 and 173 provision is made for the appearance of persons not named in the writ. By sect. 174, for limiting the defence to a part of the premises claimed (*h*). By sect. 175, for the want of reasonable certainty in the description of the premises, which is *not* to nullify the writ (*i*). And by sect. 178 it is provided, that on an appearance being entered, an issue may at once be made up without any pleadings, "and the question at the trial shall" (except in the cases of joint tenants, tenants in common, and coparceners) "be, whether the statement in the writ of the title of the claimants is true or false, &c." sect. 180; and in the above excepted cases, in addition to the above question, the further one,

14 Hen. VII. Rot. 303, a copy of the record of which will be found in Rastall's Entries, fol. 252, b., 253, a., ed. 1670.

(*e*) *Smith v. Tett*, 9 Exch. 307.

(*f*) See *Goodtitle v. Badtittle*, 4 Taunt. 820.

(*g*) It was formerly held, that the description of the property ought to be made with such certainty that the sheriff might know, from the record itself, of what he was to deliver possession, but the strictness of this rule was relaxed, on the ground that the sheriff was to take his information from the party recovering. *Portman v. Morgan*, Cro. Eliz. 465; *Cottingham v. King*, 1 Burr. 623; *Connor v. West*, 5 Burr. 2673.

(*h*) This was formerly done under a rule of Court, M. T. 1820; 1 Q. B. 700, *in notis*.

(*i*) Premises were laid in the declaration to be in the parish of Farnham, and at the trial were proved to be in the parish of Farnham Royal; but it was not shown by the defendant that there were two Farnhams. Variance immaterial. *Doe v. Salter*, 13 East, 9. Lands were described in the declaration to be in the parish of Westbury, in the county of Gloucester, and it was proved at the trial that there were two parishes of Westbury in that county; *viz.* Westbury upon Trym and Westbury upon Severn. Held no variance; *Doe v. Harris*, 5 M. & S. 326; although if there had been any plea in abatement in ejectment, it might have been a good objection on such plea; but there are no pleadings now. *Neave v. Avery*, 16 C. B. 328.

whether an actual ouster has taken place, sect. 188. By sect. 185, after a finding for the claimant, judgment may be signed and execution issue for the recovery of possession of the property or part (as the case may be), and for costs, &c.

By sect. 11 of the County Court Act, of 1867, actions of ejectment may be brought in the county court of the district where the lands are situate, when the annual value of the property does not exceed 20*l.*, but sect. 12 provides that a judge, if satisfied that the title to other land of greater annual value than the 20*l.* would be affected by the decision, may order such action to be tried in one of the superior courts.

Of the Requisites to support an Ejectment.—In order to maintain ejectment, the party at whose suit it is brought must have been in possession, or at least clothed with the right of possession, at all events at the date of issuing the writ (*k*).

The party who has the legal estate in the lands in question must prevail: hence, a party who claims under an *elegit*, subsequent to a lease granted to a tenant in possession, cannot recover: although he give notice to the tenant, that he does not intend to disturb the possession, and only means to get into the receipt of the rents and profits of the estate (*l*). In *Lade v. Holford*, Bull. N. P. 110, Lord *Mansfield*, C. J., declared, “that he and many of the judges had resolved never to suffer a plaintiff, in ejectment, to be non-suited by a term standing out in his own trustee, or a satisfied term set up by a mortgagor against a mortgagee; but that they would direct the jury to presume it surrendered.” From this doctrine a conclusion has been drawn, which the case by no means warrants, *viz.*, that a plaintiff in ejectment may recover on an equitable title. The true meaning of the resolution delivered by Lord *Mansfield* is, that where trustees ought to convey to the beneficial owner, it shall be left to the jury to presume that they have conveyed accordingly; or where the beneficial occupation of an estate by the possessor (under an equitable title) induces a probability that there has been a conveyance of the legal estate to the person who is equitably entitled to it, a jury may be directed to presume a conveyance of the legal estate (*m*). In these cases, when a conveyance is presumed, there is an end of the legal estate created by the term. But where the facts of the case preclude such presumption, or if there are not any premises other than the mere lapse of time (*n*), or non-dealing with the term for a considerable period (*o*),

(*k*) Keilw. 130, a. *Semble*, also at the time of its service. 15 & 16 Vict. c. 76, s. 181. The writ is in force for three months. Sect. 169.

(*l*) *Doe v. Wharton*, 8 T. R. 2.

(*m*) *Per Kenyon*, C. J., 7 T. R. 3, and 8 T. R. 122; *England v. Slade*, 4 T. R.

682; *Garrard v. Tuck*, 8 C. B. 231; Matthews on the Doctrine of Presumption, 226.

(*n*) *Doe v. Langdon*, 12 Q. B. 711.

(*o*) *Doe v. Plowman*, 2 B. & Ad. 573; *Cottrell v. Hughes*, 15 C. B. 532.

from which a surrender of the term can be presumed (*p*); or, if it appear in a special verdict (*q*), or special case (*r*), that the legal estate is outstanding in another person, the party who is not clothed with the legal estate cannot prevail in a court of law. "The doctrine, that the legal estate cannot be set up at law by a trustee against his *cestui que* trust, has long been repudiated." *Per Ellenborough, C. J.* (*s*).

It is to be observed, that in the foregoing cases, in which a surrender was presumed, the presumption was made in favour of the party who had proved a right to the beneficial ownership; the possession was consistent with the existence of the surrender required to be presumed, and made it not unreasonable to believe that the surrender should have been made in fact. But where the court was called upon to declare that the presumption ought to be made in favour of a person who had proved no right to the possession, no title, no conveyance, and one who stood on mere naked possession, without any evidence how or when he acquired it, and who laid before the jury only a partial statement of the ground of presumption, the court refused to make it (*t*). A. devised an estate to trustees for a term of years, in trust to pay annuities, and for other purposes mentioned in the will, with remainder to B.; B., eighteen years after the death of A., leased the premises for lives. In an action by the lessee of B., the jury were told by the judge that they could not presume a surrender of the term; and this direction was held to be right (*u*).

By the 8 & 9 Vict. c. 112, however, it is now enacted, "that every satisfied term of years which, either by express declaration or by construction of law, shall, *upon the 31st day of December, 1845*, be attendant upon the inheritance or reversion of any lands (*x*), shall on that day absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall be attendant as aforesaid, except that every such term of years which shall be so attendant as aforesaid by express declaration, although hereby made to cease and determine, shall afford to every person the same protection against every incumbrance, charge, estate, right, action, suit, claim and demand, as it would have afforded to him if it had continued to subsist but had not been assigned or dealt with after the said 31st day of December, 1845; and shall,

(*p*) *Doe v. Plowman*, 2 B. & Ad. 573.
 "Upon principle, a term of years assigned to attend the inheritance ought not to be presumed to be surrendered, unless there has been an enjoyment inconsistent with the existence of the term, or some act done in order to disavow the tenure under the term, and to bar it as a continuing interest." Sugd. V. & P. (11th edit.) App. 1130.

(*q*) *Goodtitle v. Jones*, 7 T. R. 43.

(*r*) *Roe v. Reade*, 8 T. R. 122.

(*s*) *Doe v. Wroot*, 5 East, 138.

(*t*) *Doe v. Cooke*, 6 Bingh. 174.

(*u*) *Day v. Williams*, 2 C. & J. 460.

(*x*) If a term be assigned by mistake in trust for persons not entitled to the inheritance or reversion, the act has no operation. *Doe v. Jones*, 13 Q. B. 774.

for the purpose of such protection, be considered in every court of law and equity to be a subsisting term." Sect. 2 enacts,—“that every term of years now subsisting or hereafter to be created becoming satisfied *after the said 31st day of December, 1845*, and which either by express declaration or by construction of law shall after that day become attendant upon the inheritance or reversion of any lands, shall, immediately upon the same becoming so attendant, absolutely cease and determine as to the land upon the inheritance or reversion whereof such term shall become attendant as aforesaid.”

The above act in effect divides satisfied attendant terms into two classes: 1. Those which were satisfied on or before the 31st of December, 1845. 2. Terms which have become satisfied since that day. The latter are absolutely determined and extinguished for all purposes; but the former, if attendant by express declaration, may, for the purpose of protection to the person for whose benefit the assignment or declaration was made, be “considered to be a subsisting term,” notwithstanding its extinction for all other purposes (*y*). A term assigned before the 31st of December, 1845, in trust for a *bond fide* purchaser for value without notice, will continue to exist for his protection if necessary, but not for the benefit of the owner of the inheritance (*z*). A satisfied term will afford no defence against the owner of the inheritance, unless the defendant be *equitably entitled* to the benefit of the term (*a*). Where the claimant and defendant are respectively entitled to the benefit of a term, there must be a demand of possession by the trustee of the term before an ejectment can be maintained in his name, especially where the *cestui que trusts* have been in actual possession above twenty years before action (*b*). The act does not apply to copyholds, sect. 3.

The plaintiff in ejectment must recover on the strength of his own title, and not on the weakness of that of the defendant (*c*). Possession gives the defendant a right against every person who cannot show a good title (*d*). But a lessee will not be permitted to defend an ejectment against his own landlord, from whom he has received possession, on a supposed defect in the title of the landlord (*e*); nor if B., claiming under A., let lands for a year to C., and die, and A., after the expiration of the term, brings an ejectment against C., can C. dispute the title of A. (*f*); nor, where the tenant in possession has paid the rent to the plaintiff, can a

(*y*) See *Cottrell v. Hughes*, 15 C. B. 532.

(*z*) *Ibid.*, and see *Doe v. Price*, 16 M. & W. 603.

(*a*) *Doe v. Mousdale*, 16 M. & W. 689.

(*b*) *Doe v. Phillips*, 10 Q. B. 130.

(*c*) *Per Cur.*, *Martin v. Strachan*, 5 T.

R. 110, n.

(*d*) *Per Lord Mansfield*, C. J., 4 Burr. 2487. See *Daintry v. Brocklehurst*, 3 Exch. 207.

(*e*) *Driver v. Laurence*, 2 W. Bl. 1259; *Francis v. Harvy*, 4 M. & W. 331.

(*f*) *Barwick v. Thompson*, 7 T. R. 488.

third person come in and defend as landlord without the tenant, and dispute the plaintiff's title (*g*).

"Neither the tenant, nor any one claiming by him, can controvert the landlord's title. He cannot put another person in possession, but must deliver up the premises to his own landlord" (*h*). This rule extends to tenancies at will or on sufferance (*i*). As, where A. let B. into possession of land under a contract of sale, which subsequently went off, it was held that B. could not dispute A.'s title (*k*). There is not any distinction between the case of a tenant and that of a common licensee. The licensee, by asking permission, admits that there is a title in the landlord. Hence, where the plaintiff being in possession of a house, &c., defendant asked leave to get vegetables in the garden, and having obtained the keys for this purpose, fraudulently took possession of the house and set up a claim of title: it was held, that the defendant, having entered by leave of the party in possession, could not defend an ejectment, but was bound to deliver up possession to the party by whom she was let in, for she could not contest the title (*l*). And so, if a person obtains possession of premises by an arrangement with the tenant, whether collusive or otherwise. Premises being in possession of a tenant under an indenture of lease, a party claiming them by an alleged title adverse to that of the lessor, and prior to the lease, demanded them of the lessee, and ultimately obtained possession by paying him 20*l*. The landlord afterwards brought ejectment against the party so in possession, the term having been forfeited by non-payment of rent, and there being no sufficient distress on the premises. It was held, that this case fell within the rule whereby the tenant is precluded from contesting his landlord's title (*m*). So also where a copyholder has been admitted to a tenement and done fealty to the lord of a manor, he is estopped, in an action by the lord for a forfeiture, from showing that the legal estate was not in the lord at the time of admittance (*n*).

But a tenant, though he cannot dispute his landlord's title at the time of the demise, may show that it has since expired (*o*), or been parted with (*p*). Where the plaintiff holding an estate under a lease for twenty-one years, underlet the same to the defendant for a year, and the defendant held over after the expiration of the twenty-one years, after which the plaintiff gave the defendant a regular notice to quit, which not being complied with, an ejectment

(*g*) *Doe v. Smythe*, 4 M. & S. 347; *Doe v. Birchmore*, 9 A. & E. 662. See *Balls v. Westwood*, 2 Campb. 11.

(*h*) *Per Dampier, J.*, 4 M. & S. 348, cited by *Parke, J.*, *Doe v. Austin*, 9 Bingh. 45, 46. See also *Cooper v. Blandy*, 1 B. N. C. 45. But see a distinction in *Hopcraft v. Keys*, 9 Bingh. 613.

(*i*) *Per Cresswell, J.*, in *Doe v. Foster*,

3 C. B. 229.

(*k*) *Doe v. Burton*, 16 Q. B. 807.

(*l*) *Doe v. Baytop*, 3 A. & E. 188.

(*m*) *Doe v. Mills*, 2 A. & E. 17.

(*n*) *Doe v. Budden*, 5 B. & Ald. 626.

(*o*) *Downs v. Cooper*, 2 Q. B. 256; *Mountnoy v. Collier*, 1 E. & B. 630.

(*p*) *Doe v. Watson*, 2 Sta. 230, cited by *Tindal, C. J.*, 4 M. & G. 152.

was brought; it was held that it was competent to the defendant to show, that the lessor's title had expired, and that he had no right to turn him out of possession (*q*). So where the tenant has not received possession from a person to whom, however, under a misrepresentation or by mistake, he has paid rent, such payment of rent will not estop the tenant from setting up the title of the real owner (*r*). M., being seised in fee of land, mortgaged it to O., but remained in possession, and afterwards demised part for a term to B., who also entered; after which M. mortgaged to H. H., after this, received rent from B., and demised the other part to A. Afterwards B. and A., on notice from O., paid O. rent. H. then brought ejectment (after notice to quit) against B. and A. It was held that B. as well as A. might show in defence the prior mortgage to O., O.'s notice to them, and their payment of rent to O.; for, although B. could not dispute M.'s title at the time of the demise, yet he might show that H. had not any derivative title from M., and he was not precluded by having paid rent to H., under a mistake of the facts (*s*).

II. *By whom an Ejectment may be brought (t).*

Administrator (*u*).

Bargainee, under a commission of bankrupt (*x*).

Churchwardens and overseers. The 59 Geo. III. c. 12, s. 17, empowers churchwardens *and* overseers (*y*), and their successors, to accept and hold, in the nature of a corporation, all real property belonging to the parish. But they are not by this statute made a proper body corporate; and therefore a demise to them is effectual, upon their assent and entry, without their acceptance by an instrument under seal (*z*). In a case where it did not appear who had the legal property at the time of the act passing, but rent had been paid to the churchwardens and overseers as such; it was held, that the property belonged to the parish, and that the present churchwardens and overseers might recover the same, having given a notice to quit, although defendant claimed to hold under a lease granted by former churchwardens and overseers, for an unexpired

(*q*) *England v. Slade*, 4 T. R. 682; *Doe v. Ramsbottom*, 3 M. & S. 516. See *Gravenor v. Woodhouse*, 1 Bingh. 38; *Cornish v. Searell*, 8 B. & C. 471; *Brook v. Biggs*, 2 B. N. C. 572.

(*r*) *Fenner v. Duplock*, 2 Bingh. 10.

(*s*) *Doe v. Barton*, 11 A. & E. 307; recognized in *Claridge v. Mackenzie*, 4 M. & G. 143.

(*t*) Committee of a Lunatic's estate cannot bring an ejectment. Hob. 215; Hutt.

16. See 16 & 17 Vict. c. 70.

(*u*) *Patten v. Patten*, Alc. & N. 493; see *Keene v. Dee*, Alc. & N. 496, n.

(*x*) 1 Wils. 276. See 12 & 13 Vict. c. 106, s. 208.

(*y*) There must be both for the statute to operate. *Woodcock v. Gibson*, 4 B. & C. 462.

(*z*) *Smith v. Adkins*, 8 M. & W. 362; and see *Gouldsworth v. Knights*, 11 M. & W. 337.

term ; inasmuch as such lease having been granted before the act, it conveyed no legal interest ; and the defendant therefore might be treated as a tenant from year to year, whose tenancy had been determined by the notice (a). Under this act, property held for the benefit of a parish, vests in the churchwardens and overseers (b), where there are not any known trustees in existence (c), nor any other person in whom the legal estate is vested (d) ; and the statute extends to tenements, the profits of which are applicable to the purpose for which a church-rate is levied (e) ; but not to a case where the trust is for special and not for general purposes, and where the land for which the profits are to be applied cannot be called parish property (f). So where it is held jointly by the churchwardens *and other* persons for parish *and other* purposes (g). *Secus*, where it is held by the churchwardens, &c. *and* corporation for parochial purposes only (h). Proof that the churchwardens, &c. acted as such, is *prima facie* evidence that they held the offices (i). By the 5 & 6 Will. IV. c. 69, ss. 8 & 9, guardians of unions are incorporated, and are empowered to hold lands, &c. for the benefit of the parish, and to sue and be sued, &c. ; but although this statute confers upon the guardians very extensive powers over the parish property, it is quite consistent with the continuance of the legal estate in other persons, and is not sufficient to divest property out of the parish officers (j).

Conusee of a statute merchant or staple.

Coparceners. Before the Common Law Procedure Act, 1852, they might have sued either jointly (k) or severally for their own shares (l), but under a joint demise by two or more, one of whom had no title, the other or others could not have recovered (m). The last-mentioned act, however, by sect. 180, provides, that "the question at the trial shall be whether the statement in the writ of the title of the claimants is true or false, and if true, then *which* of the claimants is entitled, &c.," and the statement of the claimants' title in the writ is conformable thereto, "to the possession whereof A., B., and C., *some or one of them*, claim to be entitled, &c." (n).

Copyholders (o). A copyholder cannot make a lease for more than one year without a licence, or by special custom, without in-

(a) *Doe v. Terry*, 4 A. & E. 274.

(b) *Doe v. Hiley*, 10 B. & C. 885.

(c) *The Churchwardens of Deptford v. Sketchley*, 8 Q. B. 394.

(d) *Per Denman*, C. J., *Allason v. Stark*, 9 A. & E. 255.

(e) *Doe v. Hiley*, 10 B. & C. 885.

(f) *Allason v. Stark*, 9 A. & E. 255.

(g) *Uthwatt v. Elkins*, 13 M. & W. 772.

(h) *Doe v. Benham*, 7 Q. B. 976.

(i) *Doe v. Barnes*, 8 Q. B. 1037.

(j) *Doe v. Webster*, 12 A. & E. 442.

(k) *Boner v. Inner*, *Ld. Raym.* 726 ; 1 *Inst.* 180 b. ; *Bull. N. P.* 107 ; 1 *Roll. Abr.* 878, pl. 5 ; see *Stedman v. Bates*, *Ld. Raym.* 64.

(l) *Roe v. Lonsdale*, 12 *East*, 39.

(m) *Doe v. Pett*, 11 A. & E. 842.

(n) See *Elliss v. Elliss*, 27 L. J., Q. B. 316.

(o) *Moore*, 569 ; *Holdfast v. Clapham*, 1 T. R. 600. See the 15 & 16 *Vict. c.* 51, as to the enfranchisement of copyholds.

curing a forfeiture of his estate; but a lease for one year is good without either, and a copyholder may maintain an ejectment upon it (*p*). If a copyholder without licence makes a lease for one year, or with licence makes a lease for many years, and the lessee be ejected, he shall not sue in the lord's court by plaint, but shall have an *ejectio firmæ* at the common law; because he has not a customary estate by copy, but a warrantable estate by the rules of the common law (*q*). A lessee for years of a copyholder may maintain ejectment, though there be no custom in the manor to lease, and no licence has been obtained, such lease being void only as against the lord (*r*). An heir to whom a copyhold descends may surrender before admittance, because he is in by course of law, and the custom, which makes him heir to the estate, casts the possession upon him from his ancestor; consequently such heir may maintain ejectment before admittance (*s*), but the heir claiming under a tenant-right of renewal in customary lands not of inheritance, but to which the tenant is admitted for the joint lives of himself and the lord, cannot maintain ejectment before admittance (*t*).

The *grantee* of a copyhold in *reversion* has a good and perfect title by the grant, without admittance, and may maintain ejectment on the death of the tenant for life (*u*). But a stranger, to whom a copyhold is *surrendered*, has nothing before admittance, because he is a purchaser. Until the admittance of the surrenderee, the copyhold remains in the surrenderor, and if he die, his heir may bring ejectment (*x*). But, after admittance, the surrenderee may maintain ejectment against the surrenderor, (or even before, if he be admitted before the trial (*y*)), because as against all persons but the lord the title of the surrenderee after admittance is perfect as from the time of the surrender, and shall relate back to it (*z*). A mortgagee of copyhold premises who has not been admitted, cannot maintain ejectment against the tenant of the mortgagor unless the relation of landlord and tenant shall have been established *aliunde* (*a*). Admittance of tenant for life is admittance of him in remainder (*b*), or reversion (*c*), without any other admittance, for they make but one estate. And the heir of a devisee in remainder who has died without entry (the tenant of the particular estate having been admitted) can maintain ejectment (*d*). But if a copyhold be surrendered to one for life,

(*p*) *Frosel v. Welsh*, Cro. Jac. 403; *Erish v. Rives*, Cro. Eliz. 717.

(*q*) Co. Cop. s. 51.

(*r*) *Doe v. Tresidder*, 1 Q. B. 416.

(*s*) Adm. *per Cur.* in *Roe v. Hicks*, 2 Wils. 15, and *per Kenyon*, C. J., in *Doe v. Hellier*, 3 T. R. 169.

(*t*) *Doe v. Clift*, 12 A. & E. 566; *Doe v. Thompson*, 13 Q. B. 670.

(*u*) *Roe v. Loveless*, 2 B. & Ald. 453.

(*x*) *Wilson v. Weddell*, Yelv. 144.

(*y*) *Doe v. Hall*, 16 East, 208.

(*z*) *Holdfast v. Clapham*, 1 T. R. 600.

(*a*) *Rayson v. Adcock*, 9 Jur. (N. S.) C. P. 800.

(*b*) *Auncelme v. Auncelme*, Cro. Jac. 31; *Warsopp v. Abell*, 5 Mod. 307.

(*c*) *Doe v. Larves*, 7 A. & E. 195.

(*d*) *Doe v. Thomas*, 3 M. & G. 815.

remainder to another in fee, if the lord is by custom to have a fine from the remainderman, there is occasion for a new admittance (*e*). And such a custom is good (*f*). An heir at law may devise his copyhold estate, without having been admitted (*g*), and without previous payment of the lord's fine (*h*). The devisee of a copyhold or customary estate, which had been surrendered to the use of the will, having died before admittance, it was held, that her devisee, though afterwards admitted, could not recover in ejectment; for the admittance of the second devisee had no relation to the last legal surrender, and the legal title remained in the heir of the surrenderor (*i*). So the devisee of a surrenderee for valuable consideration, but who had never been admitted (*k*).

If the copyholders of a manor belonging to a bishopric, during the vacancy of the see, commit a forfeiture by cutting timber, the succeeding bishop may bring ejectment (*l*). The lord may seize copyhold land *quousque*, in virtue of a right which accrued to the preceding lord, on default of the heir coming in to be admitted, and that, although he be the devisee, and not the heir of the preceding lord; but to entitle the lord to make such seizure, there must be three proclamations made, at three consecutive courts (*m*). A copyhold tenant surrendered his estate to the use of another, and afterwards committed and was convicted of felony before admittance of the surrenderee: it was held, that the estate was by the custom forfeited to the lord (*n*). Where a copyholder was convicted of a capital felony, but pardoned, upon condition of remaining two years in prison, and the lord did not do any act towards seizing the copyhold; it was held, that at the expiration of the two years, the copyholder might maintain ejectment against one who had ousted him; inasmuch as the pardon, by virtue of 6 Geo. IV. c. 25, s. 7, restored him to his competency, and the estate would not vest in the lord without any act done by him (*o*). Copyholds are within the statute against fraudulent conveyances, 27 Eliz. c. 4 (*p*).

Corporation aggregate (*q*), or sole.

Devisee (*r*).

Grantee of rent-charge, with a power to retain until satisfaction (*s*).

(*e*) *Gipping v. Bunning*, Moore, 465.
See *R. v. Dullingham*, 8 A. & E. 868.

(*f*) *Doe v. Jenney*, 5 East, 522.

(*g*) *Doe v. Lawes*, 7 A. & E. 195.

(*h*) *Wright v. Banks*, 3 B. & Ad. 664.

(*i*) *Doe v. Vernon*, 7 East, 8; *Doe v. Lawes*, 7 A. & E. 213, *acc.*

(*k*) *Mathevs v. Osborne*, 13 C. B. 991.
See 1 Vict. c. 26, s. 3.

(*l*) *Reed v. Allen*, Bull. N. P. 107.

(*m*) *Doe v. Trueman*, 1 B. & Ad. 736.

See *Dimes v. Grand Junction Canal*, 9 Q. B. 469.

(*n*) *Rex v. Lady St. John Mildmay*, 5 B. & Ad. 254.

(*o*) *Doe v. Evans*, 5 B. & C. 584.

(*p*) *Doe v. Bottrill*, 5 B. & Ad. 131.

(*q*) Carth. 390; 12 Mod. 113; *Doe v. Bold*, 11 Q. B. 127.

(*r*) 1 Inst. 240, b.

(*s*) 1 Saund. 112.

Guardian in socage (*t*). Guardian in socage may make a lease of the infant's estate until his age of fourteen years, and upon such lease the lessee may maintain an ejectment (*u*). Guardian in socage may bring trespass or ejectment in his own name, or make a lease of the land in his own name, until the infant arrive at the age of fourteen (*x*).

Guardian appointed by deed or will, under the 12 Car. II. c. 24, ss. 8 & 9, has the same interest in all respects as a guardian in socage had before, except that such guardian may hold his office for a longer time than the guardian in socage could; *viz.*, until the heir attain the age of twenty-one. The next of kin not inheritable were the persons entitled to be guardians in socage; but, under the statute, the person appointed by the father shall be guardian (*y*).

Infant (*z*).

Joint Tenants. Before the Common Law Procedure Act, 1852, they might either have recovered the land under a joint demise from all or under several demises of the whole land from each (*a*); or each might sue for his own share on his separate demise (*b*); but under a joint demise by two or more, one or more of whom had no title, the other or others could not have recovered (*c*). This difficulty is now obviated by sect. 180 of that act; see *ante*, p. 622.

Legatee of a chattel real may maintain ejectment against the executor (*d*) or a stranger (*e*); but the assent of the executor to the bequest must be proved (*f*), for until such assent the term does not vest in the legatee. Such assent is a question of fact for the jury (*g*). Slight evidence of assent is sufficient (*h*), but an ambiguous expression ought not to be left to the jury as evidence of assent (*i*). And the rule that slight evidence only of assent is necessary is confined to cases where such assent would be rightful, and is not to be implied against the executor's own acts (*k*).

Mortgagee (*l*). Where a clause in a mortgage deed operates as a redemise to the mortgagor, it was held that a notice to quit given by him in his own name to a tenant let into possession by him before the mortgage, enabled him to recover in ejectment on his own demise (*m*). It cannot so operate where the time is not *determinate* (*n*), nor where such a construction is inconsistent with

(*t*) Cro. Jac. 99; Adm. Hutt. 16, 17.

(*u*) 2 Roll. Abr. 41, (Q.) pl. 4.

(*x*) *Per Cur.*, Ld. Raym. 131.

(*y*) See Vaughan, 179, and 1 P. Wms. 102. See also several learned notes on the subject of guardianship in Harg. Co. Litt. 88, b.

(*z*) *Per Mallett, J.*, March, 143.

(*a*) *Doe v. Fenn*, 3 Campb. 190.

(*b*) *Doe v. Pearson*, 6 East, 172.

(*c*) *Doe v. Beck*, 13 C. B. 329.

(*d*) *Doe v. Guy*, 3 East, 120.

(*e*) *Young v. Holmes*, 1 Str. 70.

(*f*) *Johnson v. Warwick*, 17 C. B. 516.

(*g*) *Mason v. Farnell*, 12 M. & W. 674.

(*h*) *Doe v. Mabblerley*, 6 C. & P. 126.

(*i*) *Doe v. Harris*, 16 M. & W. 517.

(*k*) *Tudor v. Guest*, 27 L. J., Exch. 395.

(*l*) Doug. 21; Salk. 245.

(*m*) *Doe v. Goldwin*, 2 Q. B. 143.

(*n*) *Doe v. Day*, 2 Q. B. 147.

the obvious intention of the parties as appearing by the deed itself, although a yearly rent is reserved (o). Where a railway act gave a form of a mortgage by which the company were to assign "the said undertaking and all and singular the rates, tolls, and other sums arising, &c.;" it was held, that by such mortgage the mortgagee did not acquire a title to the land, and that he could not bring ejectment as on a demise "of the said undertaking and all and singular the rates, tolls, &c.," arising by virtue of the Act. (p).

By 15 & 16 Vict. c. 76, s. 219—Where any action of ejectment shall be brought by any mortgagee, his heirs, executors, &c., and no suit shall be depending in equity for foreclosing or redeeming such mortgaged lands, if the person having right to redeem, and who shall appear and become defendant, shall, pending such action, pay unto the mortgagee, or, in case of refusal, bring into court, principal, interest, and costs (to be computed by the master); the monies so paid or brought into court shall be in satisfaction of such mortgage, and the court shall discharge the mortgagor or defendant from the same, and compel the mortgagee, by rule of court, at the costs of the mortgagor, to reconvey the mortgaged lands, and deliver up all deeds and writings in their custody relating to the title (q). There must be an affidavit that there is not any suit in equity depending. After judgment for the plaintiff in ejectment, the mortgagor prayed to bring the money into court (under the 7 Geo. II. c. 20); but *per Page and Chapple, Js.*, the statute gives liberty to do it, pending the action: but, after judgment, the action is not depending; the application, therefore, was refused (r). It may be brought in, however, after verdict (s). By s. 220 (of the 15 & 16 Vict. c. 76) the statute is not to extend to any case, where the party praying a redemption has not a right to redeem, or where the right is disputed, &c. (t). Hence, where the mortgagor has agreed to convey the equity of redemption to the mortgagee, the court will not stay proceedings (u).

Overseers of the poor. See *ante*, p. 621.

Personal representative (x).

Tenant by elegit (y).

Tenant in common may maintain ejectment against his companion upon an actual ouster (z). Before the C. L. P. Act, 1852,

(o) *Walker v. Giles*, 6 C. B. 662.

(p) *Doe v. St. Helen's Railway Co.*, 2 Q. B. 364; *Hart v. Eastern Union Railway Co.*, 7 Exch. 246, *acc.* See *Gardner v. London, Chatham, and Dover Railway Co.*, 2 L. R. Chan. App. p. 217.

(q) This and the 220th sections are re-enactments of 7 Geo. II. c. 20, ss. 1 and 3. See *Sutton v. Rawlings*, 3 Exch. 407.

(r) *Wilkinson v. Traxton*, B. R. M. 14

Geo. II., Serjeant Leeds' MSS.

(s) *Doe v. Clifton*, 4 A. & E. 814.

(t) See *Doe v. Louch*, 6 D. & L. 270.

(u) *Goodtill v. Pope*, 7 T. R. 185.

(x) 4 Edw. III. c. 7; 1 Vent. 30; *Doe v. Porter*, 3 T. R. 13.

(y) *Martin v. Smith*, 27 L. J., Exch. 317.

(z) Litt. sect. 322; *Doe v. Horn*, 3 M. & W. 333.

tenants in common could not have sued upon a joint demise (*a*); except, perhaps, where a joint power of re-entry was reserved on a breach of covenant in a lease (*b*); (in which case the Court of Q. B. were equally divided), but it was held that payment of rent to the agent of A., B. and C. was an admission that the tenant held under A., B. and C., and would support a joint demise, unless it were expressly proved that they were entitled in a different manner (*c*). These difficulties are now obviated by sect. 180 of that act (*d*).

III. *For what Things an Ejectment will lie.*

In general an ejectment will lie to recover the possession of any thing whereon an entry can be made, and whereof the sheriff can deliver possession.

An Ejectment will lie:—For the recovery of — acres of alder carr in Norfolk, because alder carr is a term well known in that county, and signifies the same as alnetum (*e*): beastgate in Suffolk (*f*): bedchamber (*g*): — acres of bogge in Ireland (*h*): cattlegate in Yorkshire (*i*): church, by the name of a messuage (*k*): coalmine or saltpit (*l*): — de mineris carbonum in county palatine of Durham (*m*): common of pasture if joined with other lands; for after verdict it shall be intended such common of pasture as an ejectment will lie for, *viz.* common appendant or appurtenant (*n*): cottage (*o*): — acres of furze and heath, and — acres of moor and marsh (*p*): house or garden (*q*): — part of a house, known by the name of the Three Kings in A. (*r*): land, and coalpit in the same land (*s*): messuage or tenement, called the Black Swan (*t*); — acres of mountain in Ireland (*u*):

(*a*) *Doe v. Errington*, 1 A. & E. 750.

(*b*) *Doe v. Hamilton*, 13 Q. B. 977.

(*c*) *Doe v. Grant*, 12 East, 221.

(*d*) *Elliss v. Elliss*, 27 L. J., Q. B. 316. See *ante*, p. 622.

(*e*) *Barnes v. Peterson*, 2 Str. 1063.

(*f*) *Bennington v. Goodtill*, Str. 1084.

(*g*) 3 Leon, 210.

(*h*) Cro. Car. 512.

(*i*) Ejectment for ten acres of pasture cattlegates, with their appurtenances, in a close called, &c. in Yorkshire. Motion after verdict in arrest of judgment, on the ground of uncertainty of description. *Per Cur.* Either cattlegate must be considered as pasture, and then it is synonymous with the word pasture preceding it; or else it must be taken for common of pasture for cattle, and then being after verdict it must be taken for common ap-

purtenant, which is recoverable in ejectment. *Metcalf v. Roe*, Ca. Temp. Hardw. 167.

(*k*) Salk. 256.

(*l*) *Comyn v. Kyneto*, Cro. Jac. 150.

(*m*) Carth. 277.

(*n*) *Newman v. Holdmyfast*, 1 Str. 54.

(*o*) *Hill v. Giles*, Cro. Eliz. 818.

(*p*) *Connor v. West*, 5 Burr. 2673.

(*q*) *Royston v. Eccleston*, Cro. Jac. 654.

(*r*) *Sullivan v. Seagrave*, 2 Str. 695.

(*s*) *Harebottle v. Placock*, Cro. Jac. 21.

Under the description of land, the owner of the soil may recover land which is subject to a public easement, such as the king's highway; and a wall being built on the land shall not vitiate the description. *Goodtill v. Alker*, 1 Burr. 133.

(*t*) 1 Sidf. 295.

(*u*) *Lord Kildare v. Fisher*, 1 Str. 71.

orchard (*x*): rectory of B., and a certain place there called the Vestry (*y*): stable (*z*): tithes (*a*).

An Ejectment will not lie for:—A canonry; for it is an ecclesiastical office only (*b*): a close (*c*): a manor, without describing the quantity and nature of land therein (*d*): messuage *and* tenement (*e*): messuage, garden, *and* tenement (*f*): messuage *or* tenement (*g*). But no ground for reversal on error, if demanded in same count; because when same count contains two demands, for one of which action lies and not for the other, all the damages shall be referred to the good cause of action (*h*); and *after verdict* the court will give leave (even pending a rule to arrest the judgment on this ground) to enter the verdict according to the judge's notes for the messuage only (*i*). Messuage, situate in Coventry, in the parishes of A. and B., *or one of them*: held bad for uncertainty, after verdict, and that the words "or one of them" could not be rejected (*k*). De peciâ terræ (*l*). De castro, villâ et terris (*m*).

Ejectment will not lie for things that lie merely in grant, which are not in their nature capable of being delivered in execution, as an advowson; common in gross (*n*); libera piscaria (*o*); but it will de terrâ aquâ coopertâ (*p*); nor will it lie pro quodam rivulo sive aquæ cursu, called D. (*q*); nor for pannage (*r*); nor for a tin-bound (*s*).

Under the procedure as altered by the C. L. P. Act, 1852, there are no pleadings in ejectment, but on the appearance of the defendant an issue is at once made up, sect. 178. The property must be described in the writ "with reasonable certainty," sect. 168; the want of such description, however, is not to nullify the writ, but is only ground for an application to a judge "for better particulars of the land claimed or defended," sect. 175, which are to be annexed to the record, sect. 180.

The owner of a fee granted by deed to A. and others liberty to dig for tin and other metals throughout certain lands, and to raise and dispose of the same; and to make the adits, and erect the sheds, engines, &c., necessary for the exercise of that liberty, toge

- (*x*) *Wright v. Wheatley*, Cro. Eliz. 854.
- (*y*) 3 Lev. 96; *Hutchinson v. Puller*,
- 2 Ld. Raym. 1471.
- (*z*) 1 Lev. 58.
- (*a*) *Swadling v. Piers*, Cro. Jac. 613.
- (*b*) *Doe v. Musgrave*, 1 M. & Gr. 625.
- (*c*) 11 Rep. 55; Godb. 53.
- (*d*) *Latch*, 61; Lit. Rep. 301; Hetl.
- 146.
- (*e*) *Doe v. Plowman*, 1 East, 441.
- (*f*) *Goodtitle v. Walton*, 2 Str. 834.
- (*g*) *Goodright v. Flood*, 3 Wils. 28.
- (*h*) *Doe v. Dyeball*, 8 B. & C. 70.

- (*i*) *Goodtitle v. Otway*, 8 East, 357.
- (*k*) *Goodright v. Fawson*, 7 Mod. 457.
- (*l*) Moor, 702, pl. 976.
- (*m*) Yelv. 118.
- (*n*) Cro. Jac. 146.
- (*o*) Cro. Jac. 146; Cro. Car. 492; 8
- Mod. 277; 1 Brownl. 142.
- (*p*) Cro. Car. 492; *R. v. Alresford*, 1
- T. R. 358.
- (*q*) Yelv. 143.
- (*r*) 1 Lev. 214.
- (*s*) *Doe v. Alderson*, 1 M. & W. 210.

ther with the use of all waters and watercourses, excepting to the grantor liberty for driving any new adit within the lands granted, and to convey any watercourse over the premises granted, habendum for twenty-one years; covenant by the grantee to pay one-eighth share of all ore to the grantor, and all rates, taxes, &c., and to work the mines during the term; on failure of the performance of any of the covenants, a right of re-entry was reserved to the grantor: it was held, that this deed did not amount to a lease, but was a mere licence to dig and search for minerals; and that the grantee could not maintain an ejectment for mines lying within the limits of the set, but not connected with his own workings (*t*). Although an ejectment will not lie for a liberty and privilege alone, which is a mere incorporeal hereditament, yet when an ejectment is brought for land, and liberties and privileges are appurtenant to the land, the latter may be recovered with the land, because you may recover in the ejectment all incorporeal things *included* in the demise, although an ejectment will not lie for the incorporeal things alone (*u*).

The right to a given substratum of coal lying under a certain close, is a right to land, and cannot be claimed by prescription; *aliter*, the right of getting coal under another's land (*x*).

IV. Of Entry.

An actual entry on the land was formerly necessary in one case, *viz.* to avoid a fine (*y*); and no ejectment could be maintained till entry. Fines were abolished by 3 & 4 Will. IV. c. 74; and no entry is now necessary in any case, not even to maintain an ejectment on a clause of re-entry for non-payment of rent (*z*). On entry, if made, the person entering becomes legally seised according to the nature of his title (*a*); or, if he enter for condition broken he is in of his former estate, and the lease becomes void (*b*). An entry upon an estate generally, is an entry for the whole; if it be for less, it should be so defined at the time (*c*). Where a party had a right of entry upon condition broken, and a stranger entered, and afterwards the plaintiff assented to such entry, it was held sufficient (*d*). Where lands are in the possession of a receiver,

(*t*) *Doe v. Wood*, 2 B. & Ald. 724. But such a licence is an incorporeal hereditament, assignable; *Muskett v. Hill*, 5 B. N. C. 694; inheritable, *per Martin*, B., *Martyn v. Williams*, 1 H. & N. 827; and, if the licensee occupies, use and occupation may be maintained. *Jones v. Reynolds*, 4 A. & E. 808. See *Daniel v. Gracie*, 6 Q. B. 145.

(*u*) *Per Holroyd, J., Crocker v. Fothergill*, 2 B. & Ald. 661.

(*x*) *Wilkinson v. Prind*, 11 M. & W.

33.

(*y*) *Berrington v. Parkhurst*, 2 Str. 1086.

(*z*) *Goodright v. Cator*, Dougl. 477.

(*a*) See *Barnett v. Earl of Guildford*, 11 Exch. 19.

(*b*) *Simonds v. Lawnd*, Cro. Eliz. 239.

(*c*) *Per Lord Kenyon*, C. J., 3 T. R. 170.

(*d*) *Fitchet v. Adams*, 2 Str. 1128; *per Patteson, J., Doe v. Pett*, 11 A. & E. 850.

under the Court of Chancery, an ejectment cannot be brought for such lands, without leave of the court (e).

V. Notice to Quit.

The old tenancy at will being attended with many inconveniences, the inclination of the courts is to make every tenancy a holding from year to year, *if they can find any foundation for it* (f), as if the lessor accepts yearly rent, or rent measured by any aliquot part of a year: and it has been considered as more advantageous to the parties, that such demises should be construed to be tenancies from year to year, so long as it shall please both parties; for in that case one party cannot determine the tenancy without giving a reasonable notice to quit to the other; with respect to which it may be laid down as a general rule, that half a year's notice (g), expiring with the year of the tenancy, is a reasonable notice in all cases, except where a different period is established, either by express agreement, or the custom of particular places (h). By legal computation half a year contains 182 days; for the odd hours are rejected. 1 Inst. 135, b. But a notice served on the 28th of September to quit on the 25th of March, although the period contain only 179 days, has been held good (i). So a notice on the 29th of September to quit at Lady Day following was held good (k). But in *Right v. Darby*, 1 T. R. 159, it was held, that a notice on the 26th of March to quit on the 29th of September was bad. *Prima facie* the word "month," except in the case of a mercantile instrument, means a lunar month (l); and so it is at common law if the word be used in the statute (m); but as to the latter, this is altered by 13 Vict. c. 21, s. 4.

A party who is let into possession, and pays rent under an agreement for a future lease for years, which is to contain a covenant against taking successive crops of corn, and a condition for re-entry on breach of covenant, thereby becomes a yearly tenant subject to such terms and condition (n). If the tenant die, his personal representative, having the same interest in the land which the tenant

(e) *Angel v. Smith*, 9 Ves. 335. See *Evelyn v. Lewis*, 3 Hare, 472.

(f) See *Richardson v. Langridge*, 4 Taunt. 128; where the agreement was held to be a tenancy at will, the premises being let so long as both parties liked, and a compensation reserved accruing *de die in diem*, and not referrible to a year or any aliquot part of a year.

(g) 13 Hen. VIII. 15, b.

(h) *Roe v. Wilkinson*, Harg. & But. Co. Litt. 270, b. n. 1; *Roe v. Charnock*, Peake's N. P. C. 4. By the custom of London, a tenant at will, under 40s. rent,

shall not be turned out without a quarter's warning, nor a tenant at will over 40s. without half a year's warning. *De-thick v. Saunders*, 2 Sid. 20.

(i) *Doe v. Green*, 4 Esp. 199.

(k) *Doe v. Wrightman*, 4 Esp. 6. See *R. v. Swyer*, 10 B. & C. 486; where it was held that the words "Three Years" in the prohibitory clause of a charter, imported years of office, and not calendar years.

(l) *R. v. Chawton*, 1 Q. B. 247.

(m) *Lacon v. Hooper*, 6 T. R. 224.

(n) *Doe v. Amey*, 12 A. & E. 476.

had, will be entitled to the same notice; that is, half a year's notice ending with the year (o); and if a notice to quit be served on the widow, who remains in possession, the landlord is entitled to recover, unless it be shown that some other person than the widow was executor or administrator (p). So if an infant becomes entitled to the reversion of lands leased to a tenant from year to year, he cannot maintain an ejectment, unless he has given the tenant a proper notice to quit (q). There is not any distinction between houses and land, in this respect. Half a year's notice to quit, ending with the year of the tenancy, must be given in both cases (r). Neither will the circumstance of the rent being reserved quarterly, vary the case, if the tenancy be from year to year (s). So if a house be let *from year to year*, to quit at a quarter's notice, the notice must be given to quit at the end of a quarter expiring with a year of the tenancy (t). But if the demise be for one year only, and then to continue tenant afterwards, and to quit at a quarter's notice, a quarter's notice ending with any quarter will be sufficient (u), *i. e.* (*semble*), after the expiration of the first year (v). Where premises were let at a *yearly* rent of 42*l.* payable quarterly, the tenant to hold and enjoy, &c. "*until* one of the said parties should give unto the other six months' notice," it was held that a half-yearly tenancy was established, the word "*yearly*" being one of calculation only (x). So where premises are taken under an agreement by which the "tenant is *always* to be subject to quit at three months' notice," this constitutes a quarterly tenancy, which may be determined by a three months' notice to quit, expiring at the same time of the year it commenced, or any corresponding quarter-day. But although the tenant under such an agreement enters in the middle of one of the usual quarters, if there appears to be no agreement to the contrary (*e. g.*, by paying for the broken quarter (y)), he will be presumed to hold from the day he enters, and the tenancy can only be determined by a notice expiring on that day of the year, or some other quarter-day calculated from thence (z). An insufficient notice to quit, accepted by the landlord, will not amount to a surrender by operation of law (a).

A tenancy from year to year, so long as both parties please, is determinable at the end of any year, the first as well as any subsequent year, unless in the creation of the tenancy the parties use expressions showing that they contemplate a tenancy for two years at the least (b). Thus a demise, "not for one year only, but from

(o) *Doe v. Porter*, 3 T. R. 13; *Parker v. Constable*, 3 Wils. 25.

(p) *Rees v. Perrot*, 4 C. & P. 230.

(q) *Maddon v. White*, 2 T. R. 159.

(r) *Right v. Darby*, 1 T. R. 162.

(s) *Shirley v. Newman*, 1 Esp. 267.

(t) *Doe v. Donovan*, 2 Campb. 78; 1 Taunt. 555.

(u) *Per Chambre, J., S. C.*

(v) *Thompson v. Maberly*, 2 Campb. 573.

(x) *Doe v. Grafton*, 18 Q. B. 496.

(y) *Doe v. Matthews*, 11 C. B. 675.

(z) *Kemp v. Derrett*, 3 Campb. 510; *Doe v. Dobell*, 1 Q. B. 806.

(a) *Per Parke, B., Doe v. Milward*, 3 M. & W. 332, and *post*, pp. 636, 637.

(b) *Doe v. Smaridge*, 7 Q. B. 957.

year to year," enures as a demise for two years at least; and consequently, the tenant cannot be ejected after a notice to quit at the expiration of the first year (c). So where land was let for one year, and so on from year to year, until the tenancy should be determined as after mentioned, with a proviso that three months should be sufficient notice to be given from either party, and another proviso that it should be lawful for either party to determine the tenancy by giving three months' notice; it was held, that the tenancy was not determinable by three months' notice expiring before the end of the second year (d). But where furnished apartments were taken "for twelve months *certain*, and six months' notice *afterwards*;" it was held, that the defendant was only bound to remain the twelve months certain, and that he was at liberty to quit at the end of that period, by giving six months' previous notice. Lord *Ellenborough*, C. J., laid considerable stress upon the word *certain*, applied to the first twelve months, which showed that everything afterwards was *uncertain* and depended on the notice (e).

If a lessee, after the expiration of the lease, holds over and pays rent, the law, in the absence of evidence to the contrary, presumes an agreement between the parties that the tenant shall continue the possession according to the terms of the original demise, as far as those are consistent with a tenancy from year to year (f); in which case, if the landlord means to determine the tenancy, he must give the tenant half a year's notice to quit, corresponding with the time of the original taking. In this case, the tenancy from year to year commences at the same time when the lease began; and if the tenant assign the premises, the assignee will be tenant from year to year from the same time, and notice to quit must be given accordingly: *e. g.* if the original term began from Michaelmas, the notice must be to quit at Michaelmas (g). So, where there was a demise for one year and six months certain, from August the 13th, "three calendar months' notice to be given before determination of the said tenancy," and the tenant occupied beyond the year and six months; it was held, that a three months' notice expiring on the 13th of August was good (h).

The receipt of rent is evidence to be left to a jury that a tenancy was subsisting during the period for which that rent was paid; and if no other tenancy appear, the presumption is, that that tenancy was from year to year. A., being tenant for life, with remainder to the plaintiff in fee, on 22nd of June, 1785, demised to the defendant, for twenty-one years, to commence from old Lady Day then past.

(c) *Denn v. Cartwright*, 4 East, 31.

(d) *Doe v. Green*, 9 A. & E. 658; *R. v. Chawton*, 1 Q. B. 247, *acc.*

(e) *Thompson v. Maberly*, 2 Campb. 573.

(f) See *Hutton v. Warren*, 1 M. & W.

475, *per Parke*, B.

(g) *Doe v. Samuel*, 5 Esp. 173.

(h) *Doe v. Dobell*, 1 Q. B. 806; *Berrey v. Lindley*, 3 M. & G. 498, *acc.* But see *Doe v. Lines*, 11 Q. B. 402, which was a case of an under-tenant.

On the 30th of September, 1785, A. died: the defendant continued in possession, and paid rent to the plaintiff for two years, on old Lady Day and old Michaelmas Day; before old Michaelmas Day, 1787, the plaintiff gave the defendant notice to quit on old Lady Day then next. Adjudged, *per Cur.*, that the notice was good, on the ground that payment of rent on the 5th of April was evidence of an agreement for a tenancy from year to year to hold from that day; although it was objected, that the interest of the tenant for life having expired on the 30th of September, the notice ought to have been to quit at the end of the year from that time (*i*). In January, 1790, A. let a farm to the defendant for *seven years* by *parol*. Defendant was to enter at old Lady Day on the land, and on the house on the 25th of May, and he was to quit at Candlemas. On the 22nd of September, 1792, a notice to quit at Lady Day next was served on defendant. The court held, that this notice was improper; Lord *Kenyon*, C. J., observing, that though the agreement be void by the Statute of Frauds, as to the duration of the lease, yet it must regulate the terms, on which the tenancy subsisted, in other respects, *i. e.* as to the rent, the time of year when the defendant was to quit, &c. The agreement was, that defendant should quit at Candlemas. If the lessor, therefore, chose to determine the tenancy before the expiration of the seven years, he could put an end to it at Candlemas only (*k*). So although a lease be "void" by virtue of the 8 & 9 Vict. c. 106, as not being by deed, yet the terms of the tenancy are regulated by it (*l*).

Acceptance of rent, as rent, by a remainder-man, will not amount to a confirmation of a lease void as against him (*m*); but it is an admission of a tenancy from year to year, and the lessee will thereby be entitled to half a year's notice to quit (*n*). In order to raise an implied tenancy from the receipt of rent, it must appear that the rent was paid and received as between landlord and tenant, so as to raise a presumption of an agreement for a tenancy from year to year, and not as in the case of a conventional rent, where the payment is made with reference to a supposed tenancy of another kind (*o*). Where, however, tenant in tail had received an ancient rent of 1*l.* 18*s.* 6*d.* from the lessee in possession, under a void lease, granted by tenant for life under a power, the rack-rent value of which was 30*l.* a year; it was held, that such tenant in tail could not maintain an ejectment, without giving the lessee some notice to quit, so as to make him a trespasser at the time of action brought, after such recognition of a lawful possession, if not as tenant from year to year, at least as tenant at will (*p*).

(*i*) *Doe v. Ward*, 1 H. Bl. 97.

(*k*) *Doe v. Bell*, 5 T. R. 471.

(*l*) *Tress v. Savage*, 4 E. & B. 36.

(*m*) *Doug.* 51; *Cowp.* 201, 483.

(*n*) *Doe v. Watts*, 7 T. R. 83; *Doe v. Morse*, 1 B. & Ad. 365, *acc.*

(*o*) *Right v. Bawden*, 3 East, 260; *Roe v. Prideaux*, 10 East, 188; *Doe v. Quigley*, 2 Campb. 505.

(*p*) *Denn v. Rawlins*, 10 East, 261. See *Doe v. Jackson*, 1 B. & C. 448.

Where the in-coming tenant enters upon different parts of the demised premises at different times, half a year's notice to quit, with reference to the substantial time of entry, that is, with reference to the original time of entry on the substantial part of the premises demised, is sufficient, the whole being demised at one entire rent. It is not necessary that the notice to quit should be given with reference to the time of entry on the other parts, which are only auxiliary to the principal subject of the demise. Neither is it necessary that separate notices to quit the other parts should be given, where all the parts are demised as one entire thing. One notice, given in conformity with the rule laid down, is sufficient (*q*). The substantial time of entry is not necessarily to be collected from the rent days; though it happened, in the case of *Doe v. Spence*, that the tenant entered on the substantial part of the premises on the day from which the rent was reckoned (*r*). It is a question of fact for the jury to decide, which is the principal and which the accessorial subject of demise; this being found, the judge may then determine whether the notice to quit has been given in due time (*s*).

Where a half-yearly tenancy is established, a half year's notice is sufficient (*t*). So where the tenancy is by the quarter, by the month, or by the week, a quarter's (*u*), month's (*x*), or week's (*y*) notice is sufficient. In a case of weekly tenancy (*z*), it was held that a week's notice was *necessary*; and *semble*, *per Coltman, J.* (*a*), that in the case of a quarterly tenancy, a quarter's notice is also necessary. "Upon the question of the necessity of a notice to quit," said *Parke, B.* (*b*), "the law is clearly settled, that a yearly tenancy cannot be determined without half a year's notice; but that rule cannot be applied to a weekly taking; for the effect of it would be to show that a half week's notice was necessary to put an end to such a tenancy. I am not aware that it has ever been decided that in the case of an ordinary monthly or weekly tenancy, a month's or a week's notice to quit *must* be given.—I am of opinion, in the absence of any evidence to prove a usage to that effect, that, in point of law, a week's notice to quit is not implied as a part of the contract in the case of an ordinary weekly taking." But it seems that a weekly tenancy cannot be determined without some notice, but it is not settled what (*c*). Where the only evidence of the terms on which apartments were hired consisted of the following receipt:—"Received of A. 126*l*. for

(*q*) *Doe v. Spence*, 6 East, 120.

(*r*) *Per Le Blanc, J.*, *Doe v. Watkins*, 7 East, 557.

(*s*) *Doe v. Howard*, 11 East, 498; *Doe v. Hughes*, 7 M. & W. 139.

(*t*) *Doe v. Grafton*, 18 Q. B. 496.

(*u*) *Kemp v. Derrett*, 3 Campb. 510.

(*x*) *Doe v. Hazell*, 1 Esp. 94.

(*y*) *Doe v. Scott*, 6 Bingh. 362; *Doe v. Raffan*, 6 Esp. 4.

(*z*) *Doe v. Bayley*, 5 C. & P. 67.

(*a*) *Towne v. Campbell*, 3 C. B. 921.

(*b*) *Huffell v. Armistead*, 7 C. & P. 56.

(*c*) *Jones v. Mills*, 10 C. B. (N. S.) 788; 31 L. J., C. P. 66.

rent of furnished house, from the 8th of May to the 1st of August;” it was held that the jury were warranted in inferring that the hiring was weekly and not quarterly (*d*).

A tenant of apartments is not justified in quitting without notice, merely from a fear, however reasonable, that his goods may be seized for his landlord’s rent (*e*).

Requisites of Notice.—Although a parol notice is sufficient (*f*), yet it is more advisable to give a written one; if the notice was attested, the witness must formerly have been called, or his absence accounted for (*g*). The terms of the notice should be clear and definite, in order to avoid any objection at the trial; for it is not incumbent on a party served with an irregular notice to object to it at the time of service; it is sufficient if he object to it at the trial (*h*). The tenant’s not objecting to the notice, however, at the time of service, is *prima facie* evidence that his tenancy determined at the time mentioned (*i*). The courts will, if possible, so construe the notice as to give effect to it (*k*), for it is not required that a notice should be worded with the accuracy of a plea (*l*). Hence, a mere misdescription of the premises will not vitiate, if the premises are sufficiently described to prevent the tenant being misled, as a notice to quit “the premises you hold of me, called the ‘Waterman’s Arms,’” instead of the “Bricklayer’s Arms” (*m*). So where the premises were described as in parish A., when they were in fact situate in parish B. (*n*). So, “I desire you to quit on the 25th of March, or *I shall insist on double rent*,” has been held good (*o*). So upon a taking from old Michaelmas to old Michaelmas, a notice to quit at Michaelmas will be sufficient (*p*); at least if it be proved, that the tenancy commenced at old Michaelmas (*q*). So a notice delivered at Michaelmas, 1795, “to quit at Lady Day *which will be* in the year 1795,” was adjudged to be good; for the intention is clear, and the words, “in the year 1795,” may be rejected (*r*). Nor is it necessary to specify the particular day (*s*). Thus a notice to quit on a certain day, “or at such time as your holding shall expire next after the expiration of half a year from the receipt of this notice,” is good (*t*). But where the tenancy commenced on the 11th of October, and the notice was

(*d*) *Towne v. Campbell*, 3 C. B. 921.

(*e*) *Rickett v. Tullick*, 6 C. & P. 66.

(*f*) *Doe v. Crick*, 5 Esp. 197; *Roe v. Pierce*, 2 Camp. 96.

(*g*) *Doe v. Durnford*, 2 M. & S. 62, unless the defendant upon notice refuse to produce the original. *Poole v. Warren*, 8 A. & E. 582.

(*h*) *Oakapple v. Copous*, 4 T. R. 361.

(*i*) *Doe v. Biggs*, 2 Taunt. 109.

(*k*) See *Doe v. Archer*, 14 East, 245; *Doe v. Church*, 3 Campb. 71.

(*l*) *Per Patteson, J.*, in *Doe v. Smith*, 5

A. & E. 353.

(*m*) *Doe v. Cox*, 4 Esp. 185.

(*n*) *Doe v. Wilkinson*, 12 A. & E. 743.

(*o*) *Doe v. Jackson*, Doug. 175; *Doe v. Goldwin*, 2 Q. B. 143; acc. see *Roberts v. Hayward*, 3 C. & P. 432.

(*p*) *Denn v. Waine*, cited Peake’s Add. Ca. 195.

(*q*) *Doe v. Vince*, 2 Campb. 256.

(*r*) *Doe v. Knightley*, 7 T. R. 63.

(*s*) *Doe v. Butler*, 2 Esp. 589.

(*t*) *Hirst v. Horn*, 6 M. & W. 393; *Doe v. Scott*, 6 Bingh. 362.

on the 17th June, 1840, to quit "on the 11th of October then next, or such other time as the tenancy might expire;" it was held, that this was not a good notice for the 11th of October, 1841, for that if it was intended to operate as a notice *for a subsequent year*, it should have been more distinct (*u*). So where the holding was from Martinmas to Martinmas, and the notice was on the 21st of October, 1842, to quit "on the 13th day of May next, or upon such other day or time as the *current* year for which you now hold will expire;" it was held bad for Martinmas, 1843 (*x*).

It is, however, essentially necessary, that the notice should be to quit at the expiration of the current year of the tenancy; that is, if the defendant hold from Michaelmas, the notice must be given half a year before Michaelmas, to quit at Michaelmas; if from Lady Day, at Lady Day, &c.; for, if a notice to quit at Midsummer be given to a tenant holding from Michaelmas, or *vice versa*, it will be insufficient (*y*); and a notice to quit at a particular day is not *prima facie* evidence of a holding from that day (*z*); unless it is served personally on the tenant, who makes no objection at the time (*a*). In a case where the notice (which was served on the defendant on the 29th of September) was to quit on the 25th of March, or the 8th day of April, next ensuing, and was objected to on the ground that it did not express with sufficient accuracy the end of the tenancy, and the time when the defendant was to quit, and that at all events it was incumbent on the plaintiff to show that the defendant's tenancy commenced either on the 25th of March or 8th of April, Lord *Kenyon*, C. J., ruled the notice to be sufficient, and that the onus of proving the commencement of his tenancy lay on the defendant (*b*).

Where the tenant, being applied to by his landlord respecting the commencement of his holding, informs him that it began on a certain day, and the landlord gives the tenant notice to quit agreeably to the information received, the tenant will be precluded from contending that his tenancy commenced on a different day, even though he can prove that the information which he gave his landlord proceeded on a mistake, and not from an intention to deceive (*c*). But where a tenant from year to year, believing that his tenancy determined at Midsummer, gave a written notice to quit at that time, which the landlord accepted, without making any objection to it, and the tenant, having afterwards discovered that his tenancy expired at Christmas, gave his landlord another notice accordingly, and on possession being demanded at Midsummer refused to quit; it was held, that the tenancy was not determined by the first notice;

(*u*) *Mills v. Goff*, 14 M. & W. 72.

(*x*) *Doe v. Morphet*, 7 Q. B. 577, overruling *Doe v. Culliford*, 4 D. & R. 248, and (*semble*) *Doe v. Smith*, 5 A. & E. 350.

(*y*) *Doe v. Milward*, 3 M. & W. 328.

(*z*) *Doe v. Calvert*, 2 Campb. 388.

(*a*) *Doe v. Forster*, 18 East, 405; *Thomas v. Thomas*, 2 Campb. 647.

(*b*) *Doe v. Wrightman*, 4 Esp. 5.

(*c*) *Doe v. Lambly*, 2 Esp. 635.

for it was not good as a notice to quit; and that it could not operate as a surrender, by note in writing, within the Statute of Frauds, being to take effect *in futuro* (*d*). A receipt for rent up to a particular day is *prima facie* evidence of the commencement of the tenancy at that day (*e*). Upon a parol demise, rent to commence from the following Lady Day, evidence of the custom of the country is admissible to show that by "Lady Day" the parties meant "old Lady Day" (*f*).

It is not essentially necessary that the notice should be directed to the defendant, if the terms of it show that the defendant is tenant to the plaintiff, and if it is proved to have been served on the defendant at the proper time (*g*). Neither is it necessary for a landlord to give notice to any one but his own tenant, although such tenant may have underlet part of the demised premises (*h*). A., tenant from year to year to B., underlet part of the premises to C. A., without receiving any regular notice to quit from B., gave up to him the part remaining in his own possession; C. having refused to deliver his part, was served with a notice to quit from B., to whom he had never paid rent, or otherwise acknowledged as his immediate landlord, but had always paid his rent to A. B. brought ejectment against C.; it was held, that the notice was insufficient, B. not having given any regular notice to A., his immediate tenant; and A. not having given any such notice to C.; and that, without one or other of such notices, C.'s interest in the part underlet continued (*i*).

Evidence that the notice was delivered and explained to the servant of the tenant at his dwelling-house, though such dwelling-house be not situated on the demised premises, is presumptive evidence that the notice came to the hands of the tenant, *the servant not being called* (*k*). So a notice served upon the wife on the demised premises is sufficient (*l*). But evidence of the notice having been left at the tenant's house without any proof of its having been delivered to a servant, or that it came to the tenant's hands, is not sufficient (*m*). Evidence of the notice being served on the premises, on one of two joint-tenants, who resided on the premises, is presumptive evidence that the notice reached the other joint-tenant, who resided elsewhere (*n*).

The notice must be such that the tenant may safely act on it at the time of receiving it. Therefore a notice by an unauthorized agent cannot be made good by an adoption of it by the principal

(*d*) *Doe v. Milward*, 3 M. & W. 328.

(*e*) *Per Lord Ellenborough*, C. J., in *Doe v. Samuel*, 5 Esp. 174.

(*f*) *Doe v. Benson*, 4 B. & Ald. 588.

(*g*) *Doe v. Wrightman*, 4 Esp. 5.

(*h*) *Roe v. Wiggs*, 2 N. R. 330. See *Cox v. Brain*, 3 Taunt. 95.

(*i*) *Pleasant v. Benson*, 14 East, 234;

Pike v. Eyre, 9 B. & C. 909, *acc.* See *Roe v. Street*, 2 A. & E. 329.

(*k*) *Jones v. Marsh*, 4 T. R. 464.

(*l*) *Roe v. Street*, 2 A. & E. 329.

(*m*) *Doe v. Lucas*, 5 Esp. 153.

(*n*) *Doe v. Watkins*, 7 East, 551; *Doe v. Crick*, 5 Esp. 196, *acc.*

after the proper time of giving it (o). A lease contained a proviso making it determinable by a notice in writing given by the lessor or his executors *under his or their respective hands*. Held, that a notice signed by two only of three executors of the lessor to whom he had devised the freehold as joint-tenants, expressing the notice to be given on behalf of themselves, and the third executor, was not good; for the notice to quit being such as the tenant was to act upon at the time, no subsequent recognition of the third executor would make it good by relation; nor was his joining in the ejectment evidence of his original assent to bind the tenant by the notice. A mode was specifically pointed out to be pursued, in order to put an end to a subsisting term (p), and that mode required the concurrence of all the joint-tenants; hence a notice by some of the joint-tenants only would have no operation (q). But, as a general rule, a notice to quit signed by one of several joint-tenants, on behalf of all, is sufficient to determine a tenancy as to all; for such a notice would clearly operate upon his own share, and the confining it to that share might work great injustice to the tenant, who, however willing he might be to be sole tenant of land, would not probably be equally willing to hold undivided shares of it; and as the tenant is entitled to treat such a notice as determining the tenancy as to the whole, the lessors must have a corresponding right (r). So a notice to quit given by a person authorized by one of several lessors, joint-tenants, determines the tenancy as to all (s), and if the tenant has paid the entire rent to such person (e. g. the clerk to a board of trustees) it is not enough for him to show that they (the trustees) were appointed at different times, as evidence that they were tenants in common (t). Where there is a mere tenancy at will, any thing which amounts to a demand of possession, although not expressed in precise and formal language, is sufficient to indicate the determination of the landlord's will (u).

A receiver appointed by the Court of Chancery, with a general authority to let the land to tenants from year to year, has also authority to determine such tenancies by a notice to quit (x); and an agent to receive rents *and let* has been held to have a similar authority (y); but a mere receiver of rents, as such, has no authority to determine a tenancy (z). A verbal notice to quit given by the steward of a corporation is sufficient, without evidence that he had an authority under seal (a); but a notice to quit given by an

(o) *Doe v. Goldwin*, 2 Q. B. 143.

(p) *Acc. Cadby v. Martinez*, 11 A. & E. 720.

(q) *Right v. Cuthell*, 5 East, 491; *Doe v. Walters*, 10 B. & C. 626, *acc.*

(r) *Doe v. Summersett*, 1 B. & Ad. 135.

(s) *Doe v. Hughes*, 7 M. & W. 139.

(t) *Doe v. Grant*, 12 East, 221.

(u) *Doe v. Price*, 9 Bingh. 356.

(x) *Doe v. Read*, 12 East, 57.

(y) *Doe v. Mizem*, 2 M. & Rob. 56.

(z) *Doe v. Walters*, 10 B. & C. 633, *per Parke, J.*

(a) *Roe v. Pierce*, 2 Campb. 96.

agent of an agent is not sufficient without the authority of, or recognition by, the principal (b).

Waiver of Notice.—Where a notice to quit has been given, the lessor must be careful not to do any act which may be construed as an affirmation of the tenancy and a waiver of the notice. A distress for rent, which accrued *after* the expiration of the time, at which, by the notice, the tenant is to quit, is an acknowledgment of the tenancy (c); so is, *prima facie*, the acceptance of rent so due (d); but it shall be left to the jury to say whether the money received was received *simpliciter* as rent, without any stipulation at the time of payment; for whether it shall be a waiver of the notice depends on the intention of the parties, which is a matter of fact to be left to the jury (e). Thus a *demand* of rent is not *in law* a waiver of notice, but only evidence for the jury of an intention to waive it (f). A landlord of premises, about to sell them, gave his tenant notice to quit, on the 11th of October, 1806, but promised him not to turn him out unless they were sold; the premises were not sold till February, 1807, when the tenant refused, on demand, to deliver up possession; on ejectment brought, laying the demise on the 12th of October, 1806, it was held, that the promise (which was performed) was no waiver of the notice, nor operated as a licence to be on the premises otherwise than subject to the landlord's right of acting on such notice, if necessary; and, therefore, that the tenant, not having delivered up possession on demand, after a sale, was a trespasser from the expiration of the notice to quit (g).

Where, during the pendency of an ejectment, the lessor delivered a second notice to quit, and it was objected, at the trial, (before *Lawrence, J.*) that the second notice was a waiver of the first, being a recognition of the tenancy still subsisting; the learned judge overruled the objection, and a verdict was found for the plaintiff. The court concurred in opinion with *Lawrence, J.*, observing, that it had been admitted, that if the plaintiff had not intended the second notice to operate as a waiver of the first, he might have so explained his intention, by adding that the second notice was to enable him to recover the premises at a subsequent assizes, if, by any accident, he should fail at those then ensuing. And the defendant must have so understood this notice; for he could not suppose that the plaintiff intended to waive the first notice, when he knew that the plaintiff was, on the foundation of that notice, proceeding by ejectment to turn him out of the farm (h). But a notice, delivered to the assignee of a tenant after the assign-

(b) *Doe v. Robinson*, 3 B. N. C. 677.

(c) *Ward v. Willingale*, 1 H. Bl. 311.

(d) *Goodright v. Cordwint*, 6 T. R. 219.

(e) *Doe v. Batten*, Cowp. 243.

(f) *Blyth v. Dennett*, 13 C. B. 178.

(g) *Whiteacre v. Symonds*, 10 East, 13.

See also *Doe v. Sayer*, 3 Campb. 8.

(h) *Doe v. Humphreys*, 2 East, 237.

ment, is a waiver of a prior notice served upon the original tenant (*i*). So where, after the expiration of a notice to quit, the landlord gave the defendant a fresh notice, that, unless he quitted in fourteen days, he would be required to pay double value, it was held, that the second notice was not a waiver of the first (*k*). Where rent is usually paid at a banker's, if the banker, without any special authority, receives rent accruing after the expiration of notice to quit, it will not operate as a waiver (*l*).

A tenant held under a demise from the 26th day of March for one year then next ensuing, and so from year to year, for so long as the landlord and tenant should respectively please. The tenant, after having held more than one year, gave a parol notice to the landlord less than six months before the 25th day of March, that he would quit on that day, and the landlord accepted and assented to the notice; it was held, that the tenancy was not thereby determined, there not having been either a sufficient notice to quit, or a surrender in writing, or by operation of law, within the Statute of Frauds (*m*). So where after a similar notice which the landlord at first acquiesced in, but ultimately refused to accept, the tenant quitted according to his notice, and the landlord entered and did some repairs, it was held, that the tenancy was not determined (*n*). In the case of a tenancy from year to year, if the landlord consents to accept another person as his tenant, the first tenant is thereby discharged, although he has not given any notice to quit, or made any surrender of his interest in writing within the Statute of Frauds; for this amounts to a surrender by operation of law (*o*).

Waiver of Forfeiture.—Here it may be proper to take notice of a doctrine analogous to the subject of the preceding remarks, *viz.* that acceptance of (*p*), or distress for (*q*), rent, due after condition broken, with notice of the breach (*r*), is a waiver of the forfeiture. If the forfeiture be for the breach of a continuing covenant, *e. g.* a covenant to *keep* insured (*s*), to repair (*t*), not to underlet (*u*), &c., such acceptance or distress operates as a waiver of past breaches only, and therefore a lessor, who has a right of re-entry reserved on a breach of covenant not to underlet, does not, by waiving his re-entry on one underletting, lose his right to re-enter on a subsequent underletting (*x*); but, where the condition is in its nature

(*i*) *Doe v. Palmer*, 16 East, 53.

(*k*) *Doe v. Steel*, 3 Campb. 117; *Messenger v. Armstrong*, 1 T. R. 53, *acc.*

(*l*) *Doe v. Calvert*, 2 Campb. 387.

(*m*) *Johnstone v. Hudlestone*, 4 B. & C. 922; see *Doe v. Milward*, 3 M. & W. 328.

(*n*) *Bessel v. Landsberg*, 7 Q. B. 638.

(*o*) *Nickells v. Atherstone*, 10 Q. B. 944; *Sparrow v. Hawkes*, 2 Esp. 505.

(*p*) *Goodright v. Davids*, Cowp. 803.

See *Doe v. Pritchard*, 5 B. & Ad. 765.

(*q*) *Doe v. Peck*, 1 B. & Ad. 428.

(*r*) *Gregson v. Harrison*, 2 T. R. 425; *Doe v. Birch*, 1 M. & W. 402. See *Croft v. Lumley* (H. of Lords), 27 L. J., Q. B. 321.

(*s*) *Doe v. Peck*, 1 B. & Ad. 428.

(*t*) *Doe v. Jones*, 5 Exch. 498.

(*u*) *Doe v. Bliss*, 4 Taunt. 735.

(*x*) *Ibid.*

single and complete, *e. g.* a covenant not to assign (*y*), to effect one policy of insurance (*z*), &c., there the acceptance of rent or a distress is a waiver of the covenant or condition itself. An absolute, unqualified *demand* of rent by a person having sufficient authority amounts (*seem*) to a waiver of a forfeiture (*a*), but it is only evidence to be left to a jury of a waiver of notice to quit (*b*). An ejectment once brought for a forfeiture operates as a final election by the lessor to determine the term, and he cannot afterwards (although there has been no judgment in the ejectment) sue for rent due or covenants broken (*c*). So an *action* for rent, due subsequent to a breach, operates as a final election on the part of the lessor to treat the defendant as a tenant, and not as a trespasser; and an action of ejectment cannot therefore be brought against him subsequently; for if it could the lessor would recover his rent twice over; first in the action for the rent, and then in the action for mesne profits (*d*). But the mere *acceptance* of rent after ejectment brought is not, it seems, a waiver of a forfeiture (*e*).

The law will always incline against forfeitures, as courts of equity relieve against them: and the general rule is, that a clause of re-entry be construed strictly (*f*). Proviso, that on non-payment of rent for twenty-one days after demand, the lease should "cease, determine, and be *utterly void*;" held, that a forfeiture could be waived by a subsequent receipt of rent nevertheless (*g*). A proviso giving power of re-entry if the lessee "shall do, or cause to be done, any act, matter, or thing, contrary to, and in breach of, any of the covenants," does not apply to a breach of the covenant to repair, the *omission* to repair not being an act done within the meaning of the proviso (*h*). In ejectment for not insuring according to covenant; it was held, that it was incumbent on the plaintiff to prove that no insurance had been effected, and that the fact that the defendant refused to show the policy, when the plaintiff required him, and did not produce it on the trial after notice, was not *prima facie* evidence against him; for the plaintiff had chosen to make the forfeiture depend on a condition peculiarly within the knowledge of the defendant, and had therefore brought the difficulty on himself (*i*). So on ejectment for non-payment of rent, a demand of the rent must be proved (*k*). It has been held, that a landlord does not waive a forfeiture by merely lying by and witnessing the act, but that there must be some act affirming the tenancy (*l*).

(*y*) *Per Patteson, J., Doe v. Pritchard*, 5 B. & Ad. 781.

(*z*) *Doe v. Peck*, 1 B. & Ad. 428.

(*a*) *Doe v. Birch*, 1 M. & W. 408, *per Parke, B.*; *Dendy v. Nicholl, acc.*

(*b*) *Blyth v. Dennett*, 13 C. B. 178.

(*c*) *Jones v. Carter*, 15 M. & W. 718.

(*d*) *Dendy v. Nicholl*, 27 L. J., C. P. 220.

(*e*) *Doe v. Meux*, 1 C. & P. 346.

(*f*) *Per Tenterden, C. J., in Doe v. Marchetti*, 1 B. & Ad. 720.

(*g*) *Arnsby v. Woodward*, 6 B. & C. 519.

(*h*) *Doe v. Stevens*, 3 B. & Ad. 299.

(*i*) *Doe v. Whitehead*, 8 A. & E. 571.

(*k*) *Doe v. Robson*, 2 C. & P. 245.

(*l*) *Doe v. Allen*, 3 Taunt. 78.

An indenture of lease contained a general covenant to repair, and a further covenant that the tenant should, within three months after notice, repair all defects, of which notice should be given. The lease contained the usual clause of re-entry. It was held, that the landlord, who had served a notice to repair *forthwith*, might maintain ejectment, before the expiration of the three months, for a breach of the general covenant to repair; for the notice was not any waiver of the forfeiture (*m*). But where the notice required the tenant to repair within three months; this was held to operate as a waiver of the forfeiture (*n*). From this last decision it appears that, in cases where a notice to repair has been given, it will be prudent not to bring ejectment until the time allowed by the notice has expired. In a case where there was a general covenant to repair, but no specific power of re-entry for breach of that covenant, but a proviso for re-entry in case of non-repair within three months after notice, or in case of breach of the other covenants: notice (dated 6th of January) was given to repair within three months; and ejectment was brought before the expiration of the three months. At the trial an order of court was made by consent, that a juror should be withdrawn, and the repairs performed on or before the 24th of June. The repairs not being performed on that day, another ejectment was brought, and the plaintiff had a verdict, and the court refused a rule for a new trial, for the right of entry was at all events only suspended, *Parke, J.*, observing, that "the plaintiff had put an end to the first action by consenting to the order of court. It was the same as if the parties, after the 6th of January, and before the expiration of the three months, had agreed, that the time for repairing should be extended to the 24th of June: it was merely a consent to postpone the time of completing the repair for the benefit of the defendant: and on his failing to comply with the terms, the plaintiff might justly insist on his right of entry, and bring a new ejectment after the expiration of the enlarged time" (*o*).

Where notice to quit is not required.—The doctrine relative to notices to quit is only applicable to those tenancies where the time of quitting is not agreed upon between the parties; for, where a lease is determinable upon a certain event, or at a fixed time, it is not necessary to give such notice, both parties being apprized of the determination of the term (*p*). And this is so, where the tenant holds under an invalid agreement, *e. g.* a lease void under 8 & 9 Vict. c. 106, as not being by deed (*q*), or under an agreement not amounting to a demise. A. agreed to demise a house to B., during the joint lives of A. and B.: B. entered in

(*m*) *Roe v. Paine*, 2 Campb. 520.

(*n*) *Doe v. Meux*, 4 B. & C. 606. See

Doe v. Lewis, 5 A. & E. 289.

(*o*) *Doe v. Brindley*, 4 B. & Ad. 84.

(*p*) *Per Lord Mansfield, C. J.*, in *Right v. Darby*, 1 T. R. 162.

(*q*) *Tress v. Savage*, 4 E. & B. 36.

pursuance of the agreement, and, before any lease was executed, died; after which B.'s executor took possession of the house: it was held that A. might maintain ejectment against the executor, *without a notice to quit*; because the death of B. determined his interest, and, consequently, there was not any interest vested in the executor (*r*). So where the tenant had occupied under an agreement for a lease for seven years, which period had expired (*s*). Neither is such notice necessary in a case where the possession is adverse (*t*), or where the relation of landlord and tenant does not subsist; *e. g.*, if the tenant has attorned to some other person, or done some other act disclaiming to hold as tenant to the landlord (*u*); and, in the case of a tenancy from year to year, it does not appear to be necessary that any act should be done as distinguished from a verbal disclaimer; a disavowal by the tenant of the holding under the particular landlord by words only is sufficient. But, in order to make a verbal or written disclaimer sufficient, it must amount to a direct repudiation of the relation of landlord and tenant, or to a distinct claim to hold possession of the estate upon a ground wholly inconsistent with the existence of that relation (*x*); for a tenant honestly inquiring into the title of a claimant is not thereby guilty of a disclaimer (*y*); and if the acts done by the tenant do not amount to a disavowal of the landlord's title, *e. g.*, a refusal to pay rent to a devisee under a contested will, accompanied with a declaration that he (the tenant) was ready to pay the rent to any person entitled to receive it, then the tenant is entitled to notice (*z*). *Secus*, however, if in addition to such a declaration the tenant sets up an adverse title as the ground of his refusal to pay rent to the plaintiff; or if the tenant, without setting up an adverse title, refuses to pay rent to the person under whom he claims, although he accompanies his refusal by such a declaration (*a*). It is sometimes said that a tenancy from year to year is forfeited by disclaimer; but it would be more correct to say that a disclaimer furnishes evidence in answer to the disclaiming party's assertion, that he has had no notice to quit; as it would be idle to prove such a notice where the tenant has asserted that there is no longer any tenancy (*b*). But where no notice to quit is necessary, as in the case of a term of years, a tenant does not forfeit his term by orally refusing, upon demand made by his landlord, to pay the rent, and claiming the fee as his own (*c*).

(*r*) *Doe v. Smith*, 6 East, 530.

(*s*) *Doe v. Stratton*, 4 Bingh. 446.

(*t*) *Doe v. Williams*, Cowp. 622.

(*u*) *Throgmorton v. Whelpdale*, Bull. N. P. 96.

(*x*) *Per Parke, B., Doe v. Stanion*, 1 M. & W. 703.

(*y*) *Per Tindal, C. J., Doe v. Cooper*,

1 M. & G. 138.

(*z*) *Doe v. Pasquali*, Peake's N. P. C. 196.

(*a*) *Doe v. Rollings*, 4 C. B. 188.

(*b*) *Per Patteson, J., in Doe v. Wells*, 10 A. & E. 427.

(*c*) *S. C.*

A mortgagor in possession stands in a peculiar character; and is liable to be treated as tenant or trespasser at the option of the mortgagee (*d*), and consequently, is not entitled to a notice to quit, or even to a demand of possession (*e*). Where a mortgagee under a special power in the mortgage deed to distrain "as for rent" distrained after the ejectment for arrears of interest accrued due *before*; it was held, that he might maintain the ejectment without giving a notice to quit (*f*). If a mortgagor lets another person into possession, as tenant from year to year after the mortgage, such tenant is not entitled to a notice to quit, either from the mortgagee (*g*), or his assignee, although the tenant has been let into possession before the assignment of the mortgage (*h*); unless from the conduct of the mortgagee or his assignee, and the tenant in possession, a tenancy can be inferred (*i*). But where a mortgagor before mortgage let a farm to P. as tenant from year to year, and after the mortgage P. let the defendant into possession in his stead, and informed the mortgagor of the fact, and the mortgagor subsequently received the rent from the hands of the defendant, it was held that the tenant's term was still in P., and consequently that the mortgagee could not maintain ejectment against the defendant without a notice to quit (*k*).

Where a person obtains possession of a house without the privity of a landlord, and afterwards a negotiation takes place for a lease, upon the terms of which the parties eventually differ, a notice to quit is not necessary (*l*). So where a person enters under an agreement for a lease, without a stipulation that in case a lease is not executed he shall hold for one year certain; if a lease be tendered to the occupier and he refuses to execute it, the lessor may eject him without any notice to quit (*m*). But where the plaintiff had put the defendant into possession under an agreement for the purchase of the land; it was held, that he could not, without a demand of possession and a refusal by the defendant, or some wrongful act by him to determine his lawful possession, treat the defendant as a wrong-doer and a trespasser, as he assumed to do by the ejectment (*n*). A minister of a dissenting congregation, after his election, was put into possession of a chapel and dwelling-house, by persons in whom the legal fee was vested, in trust to permit and suffer the chapel to be used for the purpose of reli-

(*d*) *Doe v. Maisey*, 8 B. & C. 767.

(*e*) *Doe v. Giles*, 5 Bingh. 421.

(*f*) *Doe v. Goodier*, 10 Q. B. 957. See *West v. Fritche*, 3 Exch. 216.

(*g*) *Keech v. Hall*, Doug. 22.

(*h*) *Thunder v. Belcher*, 3 East, 449.

(*i*) *Brown v. Storey*, 1 M. & G. 117.

(*k*) *Cadle v. Moody*, 30 L. J., Ex. 385.

(*l*) *Doe v. Quigley*, 2 Campb. 505.

(*m*) *Per Cur. Hegan v. Johnson*, 2 Taunt. 148.

(*n*) *Right v. Beard*, 13 East, 210. See

Doe v. Sayer, 3 Campb. 8. A vendee of land, let into possession before the completion of the contract, is a bare tenant at will; *per Parke, B.*, in *Doe v. Stanion*, 1 M. & W. 700; and such tenancy continues, however long the vendee remains in possession, till some circumstance arises; *e. g.*, the payment of rent, from which a tenancy from year to year may be inferred. *Doe v. Rock*, 4 M. & G. 30. See *Riseley v. Rile*, 11 M. & W. 25.

gious worship; afterwards, at a meeting of the congregation, it was determined that the minister should be changed; but another was not elected. Possession of the premises, demanded on behalf of the trustees, was held sufficient, without any notice to quit; as the minister was a mere tenant at will to the trustees (o); and it makes no difference that such a minister is paid by an annual salary, nor is he entitled to a reasonable time for the removal of his furniture (p). It is not necessary that this demand should be made on the premises; and even where made on a Sunday, it was held good (q).

VI. *Of the Proceeding in Ejectment.*

The mode of proceeding in the action of ejectment is now governed by the Common Law Procedure Act, 1852, s. 168, *et seq.*—The mode of commencing the action by the issuing of a writ has been already described.

By the 170th sect. it is provided, that the writ shall be served “*in the same manner as an ejectment*” (*i. e.* the declaration in ejectment) “*has heretofore been served*, or in such manner as the court or a judge shall order; and in case of vacant possession, by posting a copy thereof upon the door of the dwelling-house or other conspicuous part of the property.” It was formerly necessary, on service of the declaration, to explain to the tenants in possession the nature of the proceeding, and to read over and explain the meaning of the notice appended to the declaration (r). But as this was on the ground that they were “unintelligible to common people,”—for if the tenant admitted he understood it, no explanation was necessary (s); and so where the person upon whom the declaration was served was an attorney (t),—such explanation would not now seem necessary, and, at all events, it is waived by the defendant attorning to the plaintiff after serving of the writ (u).

The tenant or tenants in possession may be served personally at any place. But in cases where the tenant in possession cannot be served, service on the wife of such tenant must be either on the land in question, or at the dwelling-house of the husband. In this case, from the fact of the wife being served on the premises, or at the dwelling-house of the husband though not on the premises, the court presumes that the parties are living together as man and wife, and that the husband has notice of the proceedings—and on

(o) *Doe v. Jones*, 10 B. & C. 718.

(p) *Doe v. M'Kaeg*, 10 B. & C. 721.

(q) *Doe v. Benallack*, B. R. E. 10 Geo.

(r) *Doe v. Roe*, 6 Dowl. 51.

(s) *Doe v. Roe*, 1 Dowl. 518.

(t) *Doe v. Roe*, 3 M. & G. 397.

(u) *Edwards v. Griffith*, 15 C. B. 397.

this presumption, such service is deemed good (*x*). Where premises demised to one person have been underlet to others, it is necessary to serve separately all the under-tenants (*y*). Service on one of several joint-tenants has been held sufficient (*z*). So service on the messenger in possession of the premises, and on the official assignee, the tenant being bankrupt (*a*). Where the tenant in possession had rendered the premises inaccessible, and had evaded personal service, the court held it sufficient to leave the declaration and notice at the counting-house of the tenant in possession (*b*). Where a tenant in possession had absconded, leaving the key of his house in the hands of a broker, with instructions to let the house; it was held, that service on the broker, and fixing a copy on the door of the house, was sufficient (*c*); but wherever the service is upon the *agent* of the person in possession, the agency ought to be distinctly sworn to in moving for judgment (*d*). Where lodgers in a house cannot be served, service on the keeper of the house at the house is sufficient (*e*). Personal service on a lunatic in an asylum, no committee having been appointed, and a copy of the declaration having been also served upon the lunatic's servant upon the premises, has been held sufficient (*f*). In ejectment for part of the bed of a canal, service of the declaration on the clerk of the canal company (which was a corporation), at their office, was held sufficient (*g*).

Service on the servant, child, or niece, of the tenant in possession, *on the premises*, is good service, provided the service be afterwards acknowledged by the tenant himself (*h*); an acknowledgment by his wife is not sufficient (*i*). If the tenant or his wife refuse to receive the writ, a copy of it should be left for them, or affixed to the premises: so, if there be not any person in possession of the thing demised, a copy of the writ should be affixed to some conspicuous part. Where there is any thing unusual in the manner of serving the writ, it should appear (by affidavit) to the court or judge on moving for the rule or order for judgment; and if the court or judge be satisfied that the tenant has had notice of the declaration, the rule or order may be absolute in the first instance (*k*); if doubtful, a rule or order will be granted requiring the tenant to show cause why the service should not, under the special circumstances, be deemed sufficient, and they will prescribe the mode of serving the rule or order (*l*).

By 112 R. G. Hil. T. 1853—No judgment in ejectment for want of appearance or defence shall be signed without first filing an

(*x*) *Doe v. Bayliss*, 6 T. R. 765.

(*y*) *Doe v. Cock*, 4 B. & C. 259.

(*z*) *Doe v. Roe*, 6 Dowl. 291.

(*a*) *Doe v. Roe*, 6 Dowl. 456.

(*b*) *Doe v. Roe*, 1 M. & G. 238.

(*c*) *Doe v. Roe*, 6 B. N. C. 207.

(*d*) *Doe v. Roe*, 4 M. & G. 28.

(*e*) *Doe v. Roe*, 1 D. N. S. 261.

(*f*) *Doe v. Roe*, 3 M. & G. 87.

(*g*) *Doe v. Roe*, 10 M. & W. 21.

(*h*) *Doe v. Roe*, 14 East, 441; *Doe v. Roe*, 2 M. & W. 374.

(*i*) 1 B. & P. 384.

(*k*) *Doe v. Roe*, 7 Dowl. 121.

(*l*) See *Sprightley v. Dunch*, 2 Burr. 1116; *Fenn v. Denn*, 2 Burr. 1181; *Les-*

affidavit of the service of the writ, or, where personal service has not been effected, without first obtaining a judge's order or rule of court authorizing the signing of such judgment, the rule or order or duplicate thereof to be filed, together with a copy of the writ. No time is fixed within which this application must be made; but it may be made at all events in the term following the expiration of the time limited for appearance, and (*semble*) within a reasonable time, without reference to any term (*m*).

Where the tenant in possession is merely an under-tenant to some other person, as soon as the writ in ejectment is delivered to him, he is obliged by the Common Law Procedure Act, 1852, s. 209 (*n*), to give notice of such delivery to his landlord, under pain of forfeiting three years' improved or rack rent of the premises holden, *i. e.*, not the rent actually reserved, but such a rent as the landlord and tenant might fairly agree upon at the time of serving the writ, if the premises were then let (*o*). This penalty does not attach to the tenant of a mortgagor, who omits to give him notice of an ejectment brought by the mortgagee; for the statute only extends to cases where ejectments are brought inconsistent with the landlord's title (*p*).

By sect. 172—Any person not named in the writ shall, by leave of the court or a judge, be allowed to appear and defend, on an affidavit that he is in possession of the land, either by himself or his tenant (*q*). Actual possession under a claim of right is, it seems, sufficient, but not mere legal possession, *e. g.* a plaintiff in ejectment who has obtained judgment but has not been put into possession (*r*). Where, however, the landlord complies with the requisites of the 172nd section, he is *entitled* to be let in to defend (*s*). Under the 11 Geo. II. c. 19, s. 12, the following persons were admitted to defend:—Devisee in trust (*t*):—Mortgagee under the defendant (*u*). The following were not deemed landlords within the meaning of the Act:—A devisee, where ejectment was brought by the heir (*x*);—A mortgagee, who had never received rent (*y*).—The question to be considered in all cases is, whether the party applying to defend as landlord be himself interested in the event of the suit, or whether he be merely set in motion for the purposes of some other person: if the latter be the case, the court will not permit a mortgagee to defend as land-

see of Methold v. Noright, 1 Bl. R. 290; *Gulliver v. Wagstaff*, 1 Bl. R. 317; *Doe v. Roe*, 3 Dowl. 22.

(*m*) *Doe v. Roe*, 9 M. & W. 426.

(*n*) This section is an adaptation of the 11 Geo. II. c. 19, s. 12.

(*o*) *Crocker v. Fothergill*, 2 B. & Ald. 652.

(*p*) *Buckley v. Buckley*, 1 T. R. 647.

(*q*) A landlord might, previously to this enactment, be made defendant in

ejectment under 11 Geo. II. c. 19, s. 13; or with the tenant, of common right. *Fenwick v. Gravenor*, 7 Mod. 70.

(*r*) *Croft v. Lumley*, 4 E. & B. 608.

(*s*) *Butler v. Meredith*, 11 Exch. 85.

(*t*) *Lovelock v. Lancaster*, 4 T. R. 122.

(*u*) *Doe v. Cooper*, 8 T. R. 645.

(*x*) *Roe d. Leake v. Doe*, M. 29 Geo. II. C. B., Bull. N. P. 95.

(*y*) *Ibid*.

lord (z).—*Cestui que trust*, not having been in possession (a). In cases of vacant possession, no person claiming title was formerly let in to defend (b), and, it seems, could not be now; not being able to make the necessary affidavit. Permission was refused to a parson to defend for right to enter and perform divine service only (c). If a party should be admitted to defend as landlord, whose title is inconsistent with the possession of the tenant, the plaintiff may apply to the court or a judge, and have the rule discharged with costs (d); but, if that course be not adopted, and the party continue upon the record as defendant, he will not be allowed to set up such inconsistent title as a defence at the trial, as where the tenant in possession came in under the plaintiff, and had paid rent to him under an agreement that had expired (e), for if a person defends as landlord, in the right of the tenant, and that fails, his right must fail too (f).

By sect. 173—Any person allowed to defend for property, of which he is in possession by his tenant only, shall state in his appearance that he defends as landlord, “and such person shall be at liberty to set up any defence which a landlord appearing in an action of ejectment has heretofore been allowed to set up, and no other.” He cannot, for instance, set up the want of a notice to quit from the plaintiff to the tenant in possession, where the tenant has suffered judgment by default (g). *Secus* (semble), where the tenant defends with him (h). Generally, however, the landlord may set up any defence that the tenant might himself have set up (i).

By the 15 & 16 Vict. c. 76, s. 113,—which is an adaptation of the 1 Geo. IV. c. 87, s. 1,—Where the term or interest of any tenant holding under a lease or agreement *in writing* for any *term or number of years certain*, or from year to year, shall have expired, or been determined either by the landlord or tenant by regular notice to quit, and such tenant, or any one holding or claiming by or under him, shall refuse to deliver up possession, after lawful *demand in writing, made and signed* by the landlord or his agent, and served personally upon or left at the dwelling-house or usual place of abode of such tenant or person, and the landlord shall thereupon proceed by ejectment for the recovery of possession, he may, at the foot of the writ in ejectment, address a notice to such tenant or person, requiring him to find bail if ordered by the court or a judge, for the purposes thereafter specified; and upon appearance, on affidavit of service of the writ or notice, the land-

(z) *Doe v. Roe*, 6 Bingh. 613.

(a) *Lovelock v. Lancaster*, 3 T. R. 783.

(b) *Exp. Beauchamp*, Barnes, 4to. edit.

177.

(c) *Martin v. Davis*, 2 Str. 914.

(d) *Doe v. Rhys*, 2 Y. & J. 88.

(e) *Doe v. Smith*, 4 M. & S. 347.

(f) *Per Littledale, J.*, *Doe v. Litherland*, 4 A. & E. 785.

(g) *Doe v. Creed*, 6 Bingh. 327.

(h) *Doe v. Horn*, 3 M. & W. 333.

(i) *Doe v. Litherland*, 4 A. & E. 785.

lord, producing the lease or agreement, or some counterpart or duplicate thereof, and proving the execution by affidavit, and upon affidavit that the premises have been enjoyed under such lease or agreement, and that the interest of the tenant has expired or been determined by regular notice to quit, and that possession has been lawfully demanded in manner aforesaid, may move the court, or apply by summons to a judge at chambers, for a rule or summons for such tenant or person to show cause within a time to be fixed by the court, on a consideration of the situation of the premises, why such tenant or person should not enter into a recognizance by himself and two sufficient sureties, in a reasonable sum, conditioned to pay the costs and damages recovered by the claimants in the action; and the court, on cause shown, or affidavit of service, if no cause be shown, may make the rule absolute in the whole or in part, and order such tenant or person, within a time fixed, to find such bail, with such conditions, and in such manner, as shall be specified in the rule or summons, or such part of the same so made absolute; and if the party shall neglect or refuse so to do, and shall lay no ground to induce the court or a judge to enlarge the time for obeying the same, then upon affidavit of service, of the rule or order, and that it has not been complied with, the lessor or landlord may sign judgment for recovery of possession and costs.

The object of this statute is to save the landlord the necessity of going to trial when the tenant holds over vexatiously, and when the trouble and expense of an ejectment may be very disproportionate to the value of the premises. A tenancy by virtue of an agreement for three months certain, is a tenancy "for a term" within the meaning of the statute (*k*); but a tenancy for years, determinable *on lives*, is not (*l*); and where the tenant holds from year to year without a lease or agreement in writing, that is not a case within the meaning of the statute (*m*): and when the tenant holds under an agreement in writing from quarter to quarter, the tenant to quit possession at the end of any three months on receiving notice in writing, or, in the event of his losing his licence to sell ale, &c., *at any time* during the term, then forthwith to quit, on request by the landlord without any notice; the tenancy was held to be neither for a term certain, nor from year to year, within the meaning of this act (*n*). The statute does not apply to cases where the title is disputed by the tenant, who himself claims the land (*o*), nor to the case of a tenant who holds over after notice to quit given by himself, where his tenancy has not expired by efflux of time (*p*); nor to the case of a tenant who has surrendered his term, but refuses to quit the premises (*q*).

(*k*) *Doe v. Roe*, 5 B. & Ald. 766.

(*l*) *Doe v. Roe*, 7 B. & C. 2.

(*m*) *Doe v. Roe*, 5 B. & Ald. 770.

(*n*) *Doe v. Roe*, 10 M. & W. 670.

(*o*) *Doe v. Roe*, 1 Dowl. 4.

(*p*) *Doe v. Roe*, 1 D. & Ry. 540.

(*q*) *Doe v. Roe*, 1 Dowl. 142.

VII. *Of the Proceedings under 15 & 16 Vict. c. 76, s. 210, in order to obviate the Difficulties attending Re-entries at Common Law, for Non-payment of Rent Arrear.*

By 15 & 16 Vict. c. 76, s. 210 (r)—In all cases between landlord and tenant, whenever half a year's rent shall be in arrear, and the landlord has a right of entry for non-payment thereof (s), he may, *without a formal demand or re-entry*, serve a writ in ejectment (t); *or*, in case the same cannot be legally served, or no tenant be in actual possession, affix a copy thereof upon the door of any demised messuage; *or*, in case such ejectment shall not be for the recovery of any messuage, then upon some notorious place of the lands, &c., comprised in such writ; and such affixing shall be deemed legal service; and in case of judgment against the defendant for non-appearance, if it shall appear by affidavit, or be proved on the trial, in case the defendant appears, that half a year's rent was due before the writ was served, and that *no sufficient distress was to be found on the premises* countervailing the arrears then due, and that the lessor had power to re-enter; *then, and in every such case*, the lessor shall recover judgment and execution, in the same manner as if the rent in arrear had been legally demanded and re-entry made; and in case the lessee shall suffer judgment and execution without paying the rent and without proceeding for relief in equity *within six months* after execution, the lessee shall be foreclosed from all relief in equity other than appeal, and the landlord shall hold the demised premises discharged from the lease, provided that a mortgagee not in possession shall not be barred if he pay the rent and arrears within six months of execution. By sect. 212—If the tenant, at any time *before* the trial, shall pay or tender to the landlord or his attorney, or pay into court, the rent arrear and costs, all further proceedings on the ejectment shall be discontinued (u).

These sections are supplemented by the first eleven sections of the Common Law Procedure Act, 1866. By sect. 1: "In the case of any ejectment for a forfeiture brought for non-payment of rent, the court or a judge shall have power upon rule or summons to give relief in a summary manner, but subject to appeal as hereinafter mentioned, up to and within the like time after execution executed, and subject to the same terms and conditions in all

(r) This and the 112th section are adaptations of 4 Geo. II. c. 28, ss. 2, 4.

(s) By the common law the demand of rent must have been made—upon the exact day when the forfeiture accrued,—for the precise rent,—at the proper place of payment,—and at a convenient hour before sunset. See 1 Wms. Saund. 286, b, n. (16).

(t) He cannot *enter* without a demand.

Hill v. Kempshall, 7 C. B. 975.

(u) Before the 4 Geo. II. c. 28, courts of law and equity exercised a discretionary power of staying the lessor from proceeding at law, in cases of forfeiture for nonpayment of rent, by compelling him to take the money due to him. *Archer v. Snapp*, Andr. 341; 2 Salk. 597; 2 Vern. 103; 1 Wils. 75; 2 Str. 900.

respects as to payment of rent, costs, and otherwise, as in the Court of Chancery; and if the lessee, his executors, administrators, or assigns, shall upon such proceeding be relieved, he and they shall hold the demised lands according to the lease thereof made, without any new lease." This section enables the courts of common law to administer relief *after* the trial, and within the six months limited by s. 210 of the Common Law Procedure Act, of 1852, for the intervention of a court of equity.

The statute (of 1852) only applies to cases where the right of re-entry is absolute, and the lease upon such re-entry forfeited, and not to a right to re-enter and hold "till the rent be satisfied," although in such a case the landlord might maintain ejectment at common law, complying with the requisite formalities of demand (*v*). So, if the time (if any) allowed to the tenant for payment of the rent, after it becomes due and before the right of re-entry accrues, has not expired when the writ is served, the ejectment is too early (*x*). The right of re-entry must be taken to have accrued on the day when the forfeiture would have accrued at common law, if the rent had been then duly demanded (*y*). The words, "no sufficient distress to be found on the premises," mean no sufficient distress which can be got at; hence, where the outer door was locked, so that the landlord could not get at the premises, it was held, that there was not any sufficient distress; for there was not any available distress (*z*). Goods are not "to be found" on premises within the statute, unless a broker using reasonable diligence would be able to find them (*a*). "Countervailing the arrears then due,"—*i. e.* all the arrears, and not merely half a year's rent where more is due (*b*). A landlord does not waive his right of re-entry by taking an insufficient distress, nor by continuing in possession under such distress after the expiration of the time for the payment of the rent (*c*); unless by taking such distress the amount due is reduced to less than half a year's rent. It is sufficient for the plaintiff to show that on *some* day between the time when the right of re-entry accrued and the service of the writ there was no sufficient distress on the premises, and it then lies on the defendant to show the contrary (*d*).

Landlord, having a right of re-entry for non-payment of rent, brought an ejectment, and proved a demand of half a year's rent, *after* the day on which it was due, and a refusal on the part of the defendant to pay it before the re-entry. It appeared that there was a sufficient distress on the premises during the whole time. It was held, that the plaintiff could not recover, either at common

(*v*) *Doe v. Bowditch*, 8 Q. B. 973. But where the relationship of landlord and tenant does not exist, no demand is, it seems, necessary. *Doe v. Horsley*, 1 A. & E. 766.

(*x*) *Doe v. Roe*, 7 C. B. 134.

(*y*) *Doe v. Shawcross*, 3 B. & C. 752.

(*z*) *Doe v. Dyson*, M. & M. 77.

(*a*) *Doe v. Franks*, 2 C. & K. 678.

(*b*) *Cross v. Jordan*, 8 Exch. 149.

(*c*) *Doe v. Johnson*, 1 Sta. 411.

(*d*) *Doe v. Fuchan*, 15 East, 286.

law, or under the statute; not by the former, because the rent was not demanded on the day when it became due; nor by the latter, because there was a sufficient distress on the premises (*e*). Upon a lease reserving rent payable quarterly, with a proviso, that if the rent were in arrear twenty-one days after the day of payment, *being lawfully demanded*, the lessor might re-enter: it was held, that, five quarters being in arrear, and no sufficient distress on the premises, the lessor might re-enter without a demand (*f*); for the words so used refer to a lawful demand at common law, which the statute expressly dispensed with (*g*). It would, it seems, be otherwise, if the lease contained an express covenant that the landlord would not re-enter without demand (*h*); *i. e.* not a demand made with all the strictness of the common law, but an effectual demand (*i*), and it is clear, that at common law a demand may be dispensed with by the stipulation of the parties (*k*).

The application to the court on the part of the tenant, to stay proceedings, must, by the very terms of the act, be made *before* trial (*l*). In ejectment by a landlord, the tenant moved to stay proceedings, upon payment of the rent and costs. On a rule to show cause, it was insisted, for the plaintiff, that the case was not within the preceding statute; because it was not an ejectment founded singly on the statute, but it was brought likewise on a clause of re-entry in the lease for not repairing, and the lease was produced in court. However, the rule was made absolute, with liberty for the plaintiff to proceed upon any other title (*m*).

Where the Possession is vacant.—In cases between landlord and tenant, where one half year's rent is in arrear, and the landlord has a right of entry, the mode of proceeding, where the premises are *untenanted*, is marked out by the preceding statute. But it must not be supposed that possession is *vacant*, merely because no one is in actual possession of the premises. A. made a lease of an ale-house in London, for years (*n*). The lessee, before the expiration of the term, left it, and took another house in Wapping; but there was some liquor and old vessels left in the first-mentioned house, and the doors were locked. Upon this the landlord brought ejectment, as on a vacant possession, and had judgment; to set aside which, a motion was made. Lord *Hardwicke*, C. J.—“Though a tenant does not live on the premises, yet it cannot, from that circumstance alone, be called a vacant possession; as if a person uses one house and lives in another, that will be a good possession of

(*e*) *Doe v. Wandlass*, 7 T. R. 117.

(*f*) *Doe v. Alexander*, 2 M. & S. 525.

(*g*) See *Doe v. Shawcross*, 3 B. & C. 752.

(*h*) *Per Abbott*, C. J., *Doe v. Wilson*, 5 B. & Ald. 385.

(*i*) *Per Ellenborough*, C. J., *Doe v.*

Alexander.

(*k*) *Doe v. Masters*, 2 B. & C. 490.

(*l*) *Ibid*.

(*m*) *Pure v. Sturdy*, Bull. N. P. 97.

(*n*) *Savage v. Dent*, M. 10 Geo. II. B. R. MS.; 2 Str. 1064; Bull. N. P. 97.

both. Here the tenant had actual possession of the premises, by keeping his liquor there, and, as appears, was such a person as the landlord might have served personally with an ejectment."—*Probyn*, J., mentioned a case where hay was left in a barn by a tenant, and that was held sufficient to keep the possession. Where the premises consisted of unfinished houses, it was held, that the course was to proceed as on a vacant possession (*o*). These proceedings formerly differed from those of an ordinary ejectment, but under the C. L. P. Act, 1852, there is no difference, except in the service of the writ, which, in cases of vacant possession, may, without any leave of the court, or a judge, be "by posting a copy thereof upon the door of the dwelling-house, or other conspicuous part of the property," sect. 170; and except, perhaps, that, in such cases, no one not mentioned in the writ can be let in to defend; *ante*, pp. 648, 649.

The 11 Geo. II. c. 19, s. 16, authorizes two or more Js. P.—in cases where tenants holding premises at rack rent or three quarters of the yearly value, who are in arrear "one year" (altered to *half* a year by 57 Geo. III. c. 52 (*p*)), desert them and leave them unoccupied so as no sufficient distress can be had—on the request of the lessor, to view and affix on the most notorious part of the premises a notice in writing what day (at the distance of fourteen days at least) they will return to take a second view; and if, upon such second view, the tenant or some person in his behalf does not appear and pay the rent, or there shall not be sufficient distress upon the premises, then the justices may put the landlord into possession. By the 17th sect. (of the 2 Geo. II. c. 19) a summary appeal is given to the judges at the next assize, who may order restitution to be made; but if they dismiss the appeal, they cannot award costs against the tenant exceeding 5*l*.

It is not necessary that any complaint should be made *on oath*, in order to justify the interference of the magistrates. The *request* of the landlord or his bailiff is sufficient (*q*). Although the tenant has a summary remedy by appeal to the justices of assize, yet the record of the proceedings in pursuance of the statute unappealed from, is conclusive as to the magistrates, and will afford a complete defence to them in an action of trespass (*r*). Where the magistrates had adjudicated erroneously on the fact of desertion, and the judges of assize on appeal had made an order for the restitution of the farm to the tenant with costs; and the tenant afterwards brought trespass for the eviction, against the magistrates, the constables, and the landlord; it was held, that the record of the proceedings before the magistrates was an answer to the action on behalf of all the defendants (*s*).

(*o*) *Doe v. Roe*, 2 C. M. & R. 42.

(*p*) And extended to cases where the landlord has no right of re-entry.

(*q*) *Basten v. Carew*, 3 B. & C. 649.

(*r*) *Ibid*.

(*s*) *Ashcroft v. Bourne*, 3 B. & Ad. 684.

Under the above section the judges act as individuals and not as commissioners of assize; any order of restitution they make, therefore, should be signed by themselves and not by the clerk of assize (*t*); and directed to the sheriff (*u*). On appeal, under the above section, against an order made by two magistrates, giving possession to a landlord under sect. 16, the order made by the judges for restitution was not directed to any person. It was held, that a *mandamus* could not issue commanding the two magistrates to make restitution (*x*).

VIII. *Of the Statutes of Limitations*, 21 Jac. I. c. 16; 3 & 4 Will. IV. c. 27 (*y*).

As an action of ejectment is founded on a right of entry in the party claiming title, if the defendant can show that such right has been barred, it will be a sufficient defence to the action.

21 Jac. I. c. 16.—By the statute of James, no person could make an entry into any lands, tenements, or hereditaments, but within twenty years next after his right or title *first* descended or accrued. The plaintiff, therefore, in ejectment, must have proved either actual possession or a right of entry within twenty years, or have accounted for the want of it; for, by force of that statute, an uninterrupted possession for that period, *if adverse* (*z*), operated as a complete bar, except in cases under the second section, *viz.*, infancy, coverture, *non compos mentis*, imprisonment, and absence beyond seas. Notwithstanding the foregoing statute, however, the right of bringing an ejectment frequently existed long after the power of trying a real action had determined; for either when disabilities lasted for sixty years after the death of the ancestor, or when estates in remainder did not come into possession until after that time, real actions were barred by the 32nd of Hen. VIII. c. 2, but the right of entry was saved by the 21 Jac. I. c. 16, the possession not being (in the latter case) adverse. These questions are now set at rest (*a*) by the,—

3 & 4 Will. IV. c. 27.—By the 2nd section of which, no person shall make an entry or distress, or bring an action to recover any land (*b*) or rent, but within twenty years next after the time at

(*t*) *R. v. Sewell*, 8 Q. B. 161.

(*u*) Cole on Ejectment, 680.

(*x*) *R. v. Traill*, 12 A. & E. 761.

(*y*) See *Doe v. Morris*, 2 B. N. C. 189, on the construction of the 21 Jac. I. c. 14, limiting the right of the crown to twenty years.

(*z*) *Faireclaim v. Shackleton*, 5 Burr. 2604.

(*a*) See *Nepean v. Doe*, 2 M. & W. 894. But the 7 Will. IV. & 1 Vict. c. 28, has revived the doctrine of adverse possession in the case of a mortgagee. See *Doe v. Eyre*, 17 Q. B. 366; *post*, p. 657.

(*b*) Possession of the surface is *prima facie* possession of the minerals; *Keyse v. Powell*, 2 E. & B. 144; but this is rebutted by showing a distinct grant of the

which the right to make such entry or distress, or to bring such action, shall have *first* accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twenty years next after the time at which the right to make such entry or distress, or to bring such action, shall have first accrued to the person making or bringing the same.—The above section does not apply to rent reserved on a demise, but only to rents existing as an inheritance distinct from the land, such as ancient rent service, fee farm rents, and the like (c); and, as to these, the statute, by the conjoint operation of sects. 2 and 3, runs from the last receipt of the rent, and not from the time when the right of distress for non-payment first accrued (d).

By sect. 3, the right to make an entry or distress, or bring an action to recover any land or rent, shall be deemed to have first accrued—

1. When the person claiming such land or rent, or some person through whom he claims, shall, in respect of the estate or interest claimed, *have been in possession or in receipt of the profits of such land, or in receipt of such rent, and shall, while entitled thereto, have been dispossessed, or have discontinued such possession or receipt*, then such right shall be deemed to have first accrued at the time of such dispossession or discontinuance of possession, or at the last time at which any such profits or rent were so received.

2. When the person claiming such land or rent shall claim the estate or interest of *some deceased person who shall have continued in such possession or receipt, in respect of the same estate or interest, until the time of his death, and shall have been the last person entitled to such estate or interest, who shall have been in such possession or receipt*, then such right shall be deemed to have first accrued at the time of such death.

3. When the person claiming such land or rent shall claim *in respect of an estate or interest in possession, granted, appointed, or otherwise assured by any instrument (other than a will) to him, or some person through whom he claims, by a person being in respect of the same estate or interest in the possession or receipt of the profits of the land, or in the receipt of the rent, and no person entitled under such instrument shall have been in such possession or receipt*, then such right shall be deemed to have first accrued at the time at which the person claiming, or the person through whom he claims, became entitled to such possession or receipt by virtue of such instrument.

mines. *Hodgkinson v. Fletcher*, 3 Dougl. 31. See *Taylor v. Parry*, 1 M. & G. 604. Mere non-user for forty years, where no other party has been in possession, as in the case of mines, is no bar under the

statute. *Smith v. Lloyd*, 9 Exch. 562.

(c) *Grant v. Ellis*, 9 M. & W. 113.

(d) *Owen v. De Beauvoir*, 16 M. & W. 547; (*in error*) 5 Exch. 166.

4. When the estate or interest claimed shall have been *an estate or interest in reversion or remainder, or other future estate or interest, and no person shall have obtained the possession or receipt of the profits of such land, or the receipt of such rent in respect of such estate or interest*, then such right shall be deemed to have first accrued at the time at which such estate or interest became an estate or interest in possession; notwithstanding (sect. 5) the person claiming, &c., shall, previously to the creation of the estate which shall have determined, have been in possession or receipt of the profits of such land or in receipt of such rent.—The above clause of the third section only applies to cases where another person than the reversioner is entitled to the particular estate (e).

5. When the person claiming such land or rent, or the person through whom he claims, shall have become entitled by *reason of any forfeiture or breach of condition*, then such right shall be deemed to have first accrued when such forfeiture was incurred or such condition broken (*i.e.* as far as any re-entry *during* the lease is concerned (f)). But by sect. 4, if the land or rent shall not have been recovered by virtue of such right, the right to make an entry, &c., shall be deemed to have first accrued in respect of such estate or interest, at the time when the same shall have become an estate or interest in possession, as if no such forfeiture or breach of condition had happened (g).

The object and intent of the third section is “to explain and give a construction to the enactment contained in the second clause, as to ‘the time at which the right to make a distress for any rent shall be deemed to have first accrued,’ in those cases only, in which doubt or difficulty might occur; leaving every case which plainly falls within the general words of the second section, but is not included among the instances given by the third, to be governed by the operation of the second” (h). Therefore, a distress or action for an annuity accruing by will, and charged on land, must be resorted to within twenty years from the death of the testator (i).

The right of possession accrues to a mortgagee from the time of the execution of the mortgage deed, when there is no agreement that the mortgagor shall remain in possession until default, or any thing in the deed operating as a redemise from the mortgagor to the mortgagee for a *determinate* period (k); and this rule holds whenever there is no express agreement to that effect, as where the mortgage deed contains a covenant from the mortgagor for

(e) *Doe v. Mouldsdale*, 16 M. & W. 689.
See sect. 20, *post*.

(f) *Doe v. Bingham*, 3 Ir. L. R. 456.

(g) This is in accordance with the former law. *Doe v. Danvers*, 7 East, 299.

(h) *Per Tindal, C. J.*, delivering judgment in *Jones v. Salter*, 3 B. N. C. 553.

(i) *James v. Salter*, 3 B. N. C. 553.

(k) *Doe v. Day*, 2 Q. B. 147.

quiet enjoyment by the mortgagee *after* default (*l*), and although (*semble*) there is a covenant by the mortgagee *not* to enter until after a month's notice (*m*). And the rule, it seems, would hold, although there were in terms an agreement of redemise, if such agreement were inconsistent with the obvious intention of the parties, as appearing by the deed itself (*n*). By the 7 Will. IV. & 1 Vict. c. 28, reciting that doubts had been entertained as to the effect of the foregoing act, so far as the same related to mortgages (*o*), it is *declared* and enacted, that any person claiming under any mortgage of land, within the definition contained in the first section of the act, may make an entry or bring an action at law or suit in equity, to recover such land, at any time within twenty years next after the last payment of any part of the principal money or interest secured by such mortgage, although more than twenty years may have elapsed since the time at which the right to make such entry or bring such action or suit shall have first accrued.—This statute preserves to a mortgagee the same right of entry as if the 3 & 4 Will. IV. c. 27, had not passed, and, therefore, a mortgagee may, within twenty years after the payment of part of the principal or interest, recover against a tenant let into possession by the mortgagor before the mortgage, although the mortgagor's right as against such person be barred by the latter statute; the question in such cases being whether the possession of the tenant was *adverse* to the title of the mortgagee, as before that statute (*p*). The purchaser of property under mortgage, to whom the mortgagor and mortgagee have joined in conveying the property, is a person "claiming under a mortgage" within the above statute (*q*).

With regard to *cetteux que trust*, whose position towards their trustees is, at law, that of tenants at will (*r*), the Court of Queen's Bench, in one case (*s*), seemed to think that the case of trustee termors would come under the terms of the 3rd clause of the 3rd sect., and, consequently, that their right of entry would accrue immediately on the execution of the trust deed. But in a case in the Common Pleas (*t*), it was held, that that clause applied only to cases where the person holding the land did not hold it under or in privity with the person in whom the right of entry was supposed to be; that it could not be said in the case of a person so building under or in privity that "no person entitled under the instrument had been in possession," for that the *cestui que trust* held possession virtually under the trust deed; that their case, being thus unaffected by the 3rd sect. and expressly excluded from the 7th, was that of an ordinary tenancy at will, on which the right of

(*l*) *Doe v. Lightfoot*, 8 M. & W. 553;
Rogers v. Grazebrook, 8 Q. B. 895, *acc.*

(*m*) *Doe v. Day*, 2 Q. B. 147.

(*n*) *Walker v. Giles*, 6 C. B. 652.

(*o*) See *Doe v. Williams*, 5 A. & E. 291.

(*p*) *Doe v. Eyre*, 17 Q. B. 366.

(*q*) *Doe v. Massey*, 17 Q. B. 343.

(*r*) *Freeman v. Barnes*, 1 Vent. 80.

(*s*) *Doe v. Phillips*, 10 Q. B. 130.

(*t*) *Garrard v. Tuck*, 8 C. B. 231.

entry under the 2nd sect. would only accrue (as in other tenancies) on the determination thereof, *viz.*, by demand of possession or otherwise. The above doctrine, however, only applies to the case where the *cestui que trust* is the actual occupant. If he be only allowed to receive the rents, or otherwise deal with the estate in the hands of occupying tenants, he stands in the relation merely of an agent or bailiff of the trustees; and if, under such circumstances, the actual occupier is permitted to occupy for more than twenty years without paying rent, the title of the trustee is barred, as in the ordinary case of landlord and tenant (*u*).

Where the lessor permits his lessee, during the continuance of the lease, to pay no rent for twenty years (but there has been no adverse claim, and no payment of rent to any other person), the lessor is not therefore barred from recovering the premises in ejectment. The case falls within the latter branch of the 3rd sect. (of the 3 & 4 Will. IV. c. 27), which, in the case of an estate in reversion, provides, that the right shall be deemed to have first accrued when it became an estate or interest in possession. The lessor therefore may recover at any time within twenty years after the determination of the lease (*x*). But by sect. 9, when any person shall be in possession, &c., "by virtue of a lease in writing (*y*), by which a rent, amounting to the yearly sum of twenty shillings or upwards, shall be reserved," and the rent so reserved shall have been received by some person wrongfully claiming to be entitled to the land or rent (*z*), on the determination of the lease, and no payment in respect of the rent reserved shall afterwards have been made to the person rightfully entitled, the right of the person entitled to such land or rent (*a*), subject to such lease, accrues "at the time at which the rent reserved by such lease was first so received by the person wrongfully claiming, and no such right shall be deemed to have first accrued upon the determination of such lease to the person rightfully entitled" (*b*).

When any person shall be in possession, &c., "as *tenant from year to year or other period*, without any lease in writing," the right of the person entitled subject thereto, or of the person through whom he claims, accrues "at the determination of the first of such years or other periods, or at the last time when any rent payable in respect of such tenancy shall have been received (which shall *last* happen)," sect. 8—This section applies to tenancies from year to year existing at the passing of the act (*c*). The plaintiff proved a conveyance to himself fifty years before the action; he had not occupied; but a person who had, proved payment of rent by himself to

(*u*) *Melling v. Leak*, 16 C. B. 652.

(*x*) *Doe v. Oxenham*, 7 M. & W. 131.

(*y*) *i. e.*, an instrument passing an interest, not a mere memorandum of the terms of the tenancy. *Doe v. Gower*, 17 Q. B. 589.

(*z*) The word "rent" here means rent-charge. *Doe v. Angell*, 9 Q. B. 356.

(*a*) *Ibid.*

(*b*) See *Doe v. Angell*, 9 Q. B. 356.

(*c*) *Doe v. Sumner*, 14 M. & W. 39.

the plaintiff within thirty-three years of action brought, at which time H. came into possession. No lease to H. was shown, but it was proved that within twenty years before the action H. declared he was then paying rent to the plaintiff, and that afterwards, and before action brought, the defendant had said that he was tenant to H. H. died before the trial. Held, a sufficient proof of payment of rent by H. under the above section, and that the defendant was bound by evidence good as against H. (*d*).

When any person shall be in possession, &c., as *tenant at will*, the right of the person entitled, subject thereto, accrues "either at the determination of such tenancy, or at the expiration of one year next after the commencement of such tenancy, at which time such tenancy shall be deemed to have determined: Provided that no mortgagor or *cestui que trust* shall be deemed to be a tenant at will within the meaning of this clause, to his mortgagee or trustee," sect. 7—"The object of this section obviously is to fix a definite period, after the commencement of a tenancy at will, beyond which the tenancy shall not be presumed to have had a continuance" (*e*). But if the tenancy at will be determined (as by an entry by the landlord on the land without the consent of the tenant (*f*), but the tenant continues in occupation, it is a question for the jury whether a new tenancy at will be created between the parties (*g*). In such a case a fresh right of re-entry accrues, for the 7th sect. provides that the right of action shall accrue at the end of the first year next after the commencement of *such* tenancy, *i.e.* of the tenancy under which the tenant is actually holding, not of any preceding tenancy (*h*). Where, during the continuance of the tenancy at will, the landlord turns out the tenant, but the tenant immediately resumes possession, without, however, any fresh tenancy being created or any payment of rent, the landlord is entitled to twenty years from such resumption of possession (*i*). The proviso in sect. 7 applies to *express* trusts only, and not to persons let into possession under agreements for purchase or a lease (*k*).

In 1801, D. being seised in fee of land, permitted his daughter J. and her husband M. to occupy it as tenants at will. D. died in 1837, after the passing of the act (24th of July, 1833), but before the expiration of the five years allowed by sect. 15. He devised the land to his daughter J. for life, with remainder to W. in fee. He also devised to J. an annuity charged on other land. J. and

(*d*) *Doe v. Beckett*, 4 Q. B. 601.

(*e*) *Per Cur. Garrard v. Tuck*, 8 C. B. 251.

(*f*) *Turner v. Bennett*, 9 M. & W. 643.

(*g*) Slight evidence is sufficient; *e. g.*, a promise on one occasion to pay rent, though never performed. *Doe v. Rock*, *infra*. So where the tenant, being one

of the assessors of land tax, signed an assessment in which he was named as occupier of the land, and the plaintiff as proprietor. *Turner v. Bennett*, 9 M. & W. 643.

(*h*) *Doe v. Turner*, 7 M. & W. 226.

(*i*) *Randall v. Stevens*, 2 E. & B. 641.

(*k*) *Doe v. Rock*, 4 M. & G. 30.

M. occupied from 1801 to J.'s death in 1843, without paying rent. After J.'s death M. continued in occupation. In 1844, W., the remainder-man, brought ejectment. It was held, that W. was not entitled to insist that J. and M. had held under the devise to J., but that M. might rest his defence upon the occupation under the tenancy at will, and that W.'s right was barred by the above section (l).

No person shall be deemed to have been in possession of any land within the meaning of this act, merely by reason of having made an entry thereon. Sect. 10 (m).—Where the possession is *adverse*, as by an encroachment on the wastes of a manor, nothing short of some act (within the twenty years) which divests the possession out of the tenant, and revests it in the lord, is sufficient under this section (n); though if the possession is in fact resumed by the lord, the time for which this is done, whether for an hour or a week, is immaterial (o). *Secus*, where the possession is not adverse, as in tenancies at will, in which case any entry by the lord, which would otherwise be a wrongful act, is sufficient; for it determines the tenancy (p). No continual or other claim upon or near any land, shall preserve any right of making any entry or distress, or of bringing an action. Sect. 11.

When any one or more of several persons entitled as coparceners, joint-tenants, or tenants in common, shall have been in possession of the entirety, or more than his share, for his own benefit, or for the benefit of any person other than the person entitled to the other share, such possession shall not be deemed to have been the possession of such last mentioned person; sect. 12.—This section has relation back, and makes the possession of one coparcener, joint-tenant, or tenant in common, who has been in possession of the entirety, separate, from the time of his coming into possession, and not merely from the time of the act passing (q); and, consequently, the entry of one coparcener cannot vest the possession in the other, as formerly (r). The possession of a younger brother or other relation of the person entitled is no longer to be deemed the possession of that person. Sect. 13.

When any acknowledgment of the title of the person entitled shall have been given to him or his agent, in writing, signed by the person in possession, &c., such possession of the person, *by* whom such acknowledgment shall be given, shall be deemed to be the possession of the person *to* whom such acknowledgment shall have been given, at the time of giving the same, and the right of such last-mentioned person shall be deemed to have first accrued *at* the time at which such acknowledgment, (or the last, if more than one,)

(l) *Doe v. Moore*, 9 Q. B. 555.

(m) See *Brassington v. Llewellyn*, 27 L. J., Ex. 297.

(n) *Doe v. Coombes*, 9 C. B. 714.

(o) *Randall v. Stevens*, 2 E. & B. 641.

(p) *Turner v. Bennett*, 9 M. & W. 643.

(q) *Culley v. Taylerson*, 11 A. & E. 1008.

(r) *Woodroffe v. Daniel*, 15 M. & W.

769, p. 793.

was given; sect. 14.—Whether a writing amounts to an acknowledgment of title under this section is a question for the judge and not for the jury to decide (s). “Although if matters were contested, I am of opinion that I should establish a legal right to the premises, yet, under all the circumstances, I have made up my mind to accede to the proposal you made of paying a moderate rent, &c.” Held, an insufficient acknowledgment, there being no final bargain (t). But where in answer to an application for rent, the tenant wrote that he had been involved in law expenses with regard to the land, and “it was reasonable *the lords of the fee* should make him some recompense accordingly,” that he had applied to the plaintiff’s testator to defend “*his title* to the land,” concluding by begging “compassion, mercy and pity, and recompense in a satisfactory manner,” it was held sufficient (u). An acknowledgment of the plaintiff’s title by a person through whom the defendant claims on an answer to a bill in equity, filed by the plaintiff is a sufficient acknowledgment within the section (v).

By sect. 16—If when the right of any person to make an entry, &c., shall first accrue, such person shall have been an infant, covert, idiot, lunatic, of unsound mind, or absent beyond seas, then such person, or the person claiming through him, may, notwithstanding the twenty years have expired, make an entry or bring an action, within ten years next after the time at which the person to whom such right shall first have accrued shall have ceased to be under such disability, or shall have died, which shall first happen. Provided (sect. 17), that no entry shall be made, or action brought by any such person, but within forty years next after the time at which such right shall have first accrued, although such person may have remained under disability during the whole forty years, or although the ten years, &c., shall not have expired. Sect. 18—No further time is allowed for a succession of disabilities or different persons. Sect. 19—No part of Great Britain and Ireland, nor the Islands of Man, Guernsey, Jersey, Alderney, or Sark, nor any island adjacent to any of them, (being part of the dominions of his Majesty,) shall be deemed to be beyond seas, within the meaning of the act.

Sect. 20—When the right of any person to make an entry, &c., for an estate or interest in possession, shall have been barred by the determination of the period before limited, and such person shall, during the said period, have been entitled to any other estate, interest, right, or possibility in reversion, or otherwise, in the same land or rent, no action shall be brought in respect of such other estate, interest, &c., unless, in the mean time, such land or rent shall have been recovered by some person entitled to an estate or interest, which shall have been limited, or taken effect, after

(s) *Doe v. Edmonds*, 6 M. & W. 295.

(t) *Ibid.*

(u) *Fursdon v. Clogg*, 10 M. & W. 572.

(v) *Goode v. Job*, 28 L. J., Q. B. 1.

or in defeasance of such estate or interest in possession. In 1798, copyhold lands were surrendered to the use of husband and wife for their lives, with remainder to the heirs of the husband. In 1805, the husband absconded, and was never afterwards heard of. In 1807, a commission of bankruptcy issued against him, and the usual assignment of his estate was made by the commissioners to his assignee. The wife occupied the copyhold estate until her death in 1841, when the assignee was admitted, and brought ejectment. It was held, that the action was brought in time, the case being that of a future estate within the 3rd section of the statute, and that, supposing the 20th section to apply, the proviso at the end thereof applied also (x).

When the right of a tenant in tail to make an entry, &c., shall have been barred by the same not having been made within the period before limited, no entry, &c., shall be made by any person claiming any estate, interest or right, which such tenant in tail might lawfully have barred; sect. 21.—When a tenant in tail of any land or rent, entitled to recover the same shall have died before the expiration of the period limited for making an entry, &c., no person claiming any estate, interest, or right, which such tenant in tail might lawfully have barred, shall make an entry, or bring an action, but within the period during which, if the tenant in tail had lived, he might have made such entry or brought such action; sect. 22.—In 1788, estates were settled by marriage settlement, to the use of the wife for life, with remainders to her issue in tail, with remainder to the settlor (whose heiress at law she was) in fee. In 1818, by deeds to which the husband and wife, and their only son, R. G., were parties, and by a recovery suffered in pursuance thereof, the estates were limited to the use of the husband for life, remainder to the wife for life, remainder to R. G. the son for life, remainder to his issue in tail, remainder to J. S. his sister for life, with other remainders over. The husband died in 1819, the wife in 1822, and R. G. in 1828; it was held, that inasmuch as the estate of J. F. was carved out of the estate tail of R. G., she had the same time for bringing an ejectment as he would have had if he had continued alive, *viz.* twenty years from the year 1822, when his remainder came into possession (y).

Sect. 23—When a tenant in tail shall have made an assurance, which shall not operate to bar an estate to take effect after or in defeasance of the estate tail, and any person shall, by virtue of such assurance, at the time of its execution, or afterwards, be in possession of the land, or rent, and the same person, or any other person (other than some person entitled to such possession in respect of an estate, which shall have taken effect after or in defeasance of the estate tail), shall continue in such possession for twenty years next after the time at which such assurance, if then executed by

(x) *Doe v. Liversedge*, 11 M. & W. 517. (y) *Doe v. Edmonds*, 6 M. & W. 295.

the tenant in tail, or the person who would have been entitled to his estate tail, if such assurance had not been executed, would, without the consent of any other person, have operated to bar such estate or estates as aforesaid, then, at the expiration of such period of twenty years, such assurance shall be effectual as against any person claiming any estate, interest, or right, to take effect after or in defeasance of such estate tail.

Sect. 29—Any archbishop, &c., or other corporation sole may make an entry within such period next after the time at which the right shall first have accrued, (that is to say,) the period during which two persons in succession shall have held the office or benefice, in respect whereof the land or rent is claimed, and six years after a third person shall have been appointed thereto, if the times of such two incumbencies, and such term of six years, taken together, shall amount to sixty years; and if such times, taken together, shall not amount to sixty years, then during such further number of years, in addition to such six years, as will, with the time of the holding of such two persons, and such six years, make up sixty years; and no entry, &c., shall be made or brought at any time beyond the determination of such period.

Sect. 6—“For the purposes of this act” an administrator claiming the estate or interest of a deceased person, shall be deemed to claim as if there had been no interval between the death of the deceased person and the grant of administration.

Sect. 34—At the determination of the period limited to any person for making an entry, or distress, or bringing any writ of *quare impedit*, or other action or suit, the right and title of such person to the land, &c., for the recovery whereof such entry, &c., might have been made within such period, shall be *extinguished*.

Former statutes of limitations did not extinguish the right, but only barred the remedy (*z*). “The effect of this act is to make a parliamentary conveyance of the land to the person in possession after the period of twenty years has elapsed” (*a*); that is, if the same person, or several persons, claiming one from another have been in possession for the twenty years (*b*). And no re-entry, or, it seems, re-possession, by a claimant will re-vest his title on the doctrine of remitter, after the lapse of the statutable period (*c*).

By sect. 35, the receipt of the rent payable by any tenant from year to year, or other lessee, shall, as against such lessee, or any person claiming under him (but subject to the lease), be deemed to be the receipt of the profits of the land for the purposes of the act.

(*z*) See *Higgins v. Scott*, 2 B. & Ad. 413.

(*a*) *Per Parke, B., Doe v. Sumner*, 14 M. & W. 42.

(*b*) *Doe v. Barnard*, 13 Q. B. 952.

(*c*) *Brassington v. Llewellyn*, 27 L. J., Exch. 297.

IX. *Of the Statute of Inheritance.*

By 3 & 4 Will. IV. c. 106, s. 2, descent shall be traced from the purchaser; and the person last entitled to the land shall be considered to have been the purchaser, unless it shall be proved that he inherited the same, in which case the person from whom he inherited the same shall be considered to have been the purchaser, unless it shall be proved that he inherited the same; and in like manner, the last person from whom the land shall be proved to have been inherited, shall in every case be considered to have been the purchaser, unless it shall be proved that he inherited the same.—Where land descended to the son of an illegitimate father, who was proved to have been the purchaser thereof, and the son died seised and intestate and without issue, such land did not devolve on the heir *ex parte maternâ*, notwithstanding the above section (d). Now, however, by 22 & 23 Vict. c. 35, s. 19, “where there shall be a total failure of the heirs of the purchaser, or where any land shall be descendible as if an ancestor had been purchaser thereof, and there shall be a total failure of the heirs of such ancestor, then and in every such case the land shall descend, and the descent thereof shall be traced from the last person entitled to the land as if he had been the purchaser thereof;” and by sect. 20, the last preceding section (19) is to be read as part of 3 & 4 Vict. s. 108.

By sect. 3, when land shall have been devised by any testator to his heir, such heir shall take as devisee, and not by descent; and when land shall have been limited by any assurance to the person or to the heirs of the person who shall thereby have conveyed the same, such person shall be considered to have acquired the same as a purchaser, and not to be entitled thereto as his former estate.

By sect. 4, when any person shall have acquired any land by purchase, under a limitation to the heirs, or to the heirs of the body of any of his ancestors, contained in an assurance, or under a similar limitation contained in a will; such land shall descend and the descent thereof shall be traced, as if the ancestor named in such limitation had been the purchaser.

By sect. 5, no brother or sister shall inherit immediately from brother or sister, but every descent from a brother or sister shall be traced through the parent.

By sect. 6, every lineal ancestor is made capable of being heir to any of his issue; and where there shall be no issue of the purchaser, his nearest lineal ancestor shall be his heir in preference to any person who would have been entitled to inherit, either by tracing his descent through such lineal ancestor, or in consequence of there being no descendant of such lineal ancestor, so that the father shall be preferred to a brother or sister, and a more remote

(d) *Doe v. Blackburn*, 1 M. & Rob. 547.

lineal ancestor to any of his issue other than a nearer lineal ancestor or his issue.

By sects. 7 and 8, it is declared that the male line is to be preferred, and the mother of the more remote male paternal ancestor to be preferred to the mother of the less remote; and the mother of the more remote male maternal ancestor to the mother of the less remote.

By sect. 9, persons of the half blood are made capable of inheriting; those of the half blood on the part of the male ancestor to inherit next after the relation in the same degree of the whole blood and his issue; and those of the half blood on the part of a female ancestor next after such female ancestor.

By sect. 10, when a person through whom a descent is to be traced shall have been attainted, and died before such descent shall have taken place, the attainder shall not prevent the heir from inheriting, unless the land shall have escheated in consequence of such attainder, before the 1st January, 1834.

The act does not extend to any descent taking place on any death before the 1st January, 1834. Sect. 11. And where the heir or heirs of any person take an estate by purchase, under an assurance executed before the 1st January, 1834, or a will of any testator dying before the same day, such heir or heirs will be determined by the old law, whether the person named as the ancestor shall be living or not on the 1st January, 1834. Sect. 12.

X. Evidence.

For the Plaintiff.—The evidence required to support an ejectment will vary according to the title of the plaintiff.

Possession is *prima facie* evidence of seisin in fee simple: the declaration of a deceased possessor that he was tenant to another, makes most strongly against his own interest, and consequently is admissible to cut down *his own* title (*e*); but it must be shown that he was then in possession of the premises (*f*), for the declaration of a deceased tenant, who had parted with his interest, is not admissible to cut down the title of his alienee (*g*). So the admission of a deceased person in receipt of the rent, that he held under another, whether as tenant by sufferance, or as receiver of the rents, is evidence that he himself was not the owner of the legal estate, and, evidence being given *aliunde* of the title of the plaintiff, the plaintiff had judgment (*h*). In order to prove that the land for which ejectment was brought was part of the estate of the plaintiff's ancestor, the counterpart of a lease purporting to demise the land

(*e*) *Peaceable v. Watson*, 4 Taunt. 16;
Carne v. Nicoll, 1 B. N. C. 430.
 (*f*) *Crease v. Barrett*, 1 C. M. & R.

931, *per Parke*, B.
 (*g*) *Doe v. Webber*, 1 A. & E. 733.
 (*h*) *Doe v. Coulthred*, 7 A. & E. 239.

in question, which was dated in the lifetime of the ancestor, and apparently executed by the lessee, but by no one else, was produced from the muniment room of the ancestor. The evidence was held admissible, although no reason was given for the non-production of the lease itself, and no privity was shown to exist between the lessee and the defendant in ejectment (*i*).

It is not competent to a party, who *has* taken a beneficial interest under a deed, to dispute its execution (*k*). Therefore, where in an action by the lessee against the assignee of a lease, the plaintiff having proved the delivery of the original lease to the defendant, and the execution of the counterpart, the defendant put in the original lease, which was produced by a party to whom defendant had assigned it by a deed reciting the lease; it was held, that it was not necessary for the plaintiff to call the subscribing witness to prove the execution of the lease (*l*). But the interest taken must be an abiding one; and therefore, where, to prove a partnership between the plaintiff and defendant, the defendant produced a *contract* for work to be done, purporting to be made by them as partners with a third party; it was held, that proof of execution must be given (*m*). To the general rule that regulates the proof of deeds there are two exceptions, 1. Where they are of a certain age; 2. Where an adverse party produces, on notice, a deed under which he claims an interest (*n*). *Secus*, where it is produced from the custody of the other party (*o*). Where a notice to produce is given, and not complied with, and it appears on the plaintiff producing a copy that there was an attesting witness to the original, such witness need not be called (*p*).

Devisee of a Term (q).—Where the plaintiff is devisee of a term, he must produce in evidence the probate of the will (*r*), and prove the assent of the executor to the devise; for where a person devises, either specially or generally, goods or chattels, real or personal, and dies, the devisee cannot take them without the assent of the executor (*s*). Lessee for years devised the term to his executor for life, paying 50*l.* to J. S., remainder to the plaintiff. The executor dying, his executrix entered upon the residue of the lease, and possessed herself of the term. An ejectment having

(*i*) *Doe v. Palmer*, 3 Q. B. 622.

(*k*) *Carr v. Burdiss*, 1 C. M. & R. 782.

(*l*) *Burnett v. Lynch*, 5 B. & C. 589.

(*m*) *Collins v. Bayntun*, 1 Q. B. 117.

(*n*) *Laythorpe v. Bryant*, 1 B. N. C. 421.

(*o*) *Vacher v. Cocks*, 1 B. & Ad. 145.

(*p*) *Poole v. Warren*, 8 A. & E. 582.

(*q*) For evidence on ejectment brought by the devisee of land, see *post*, tit. "Statute of Frauds." Sect. III.

(*r*) See 20 & 21 Vict. c. 77, establishing a Court of Probate. By sect. 64, in cases where proof of the original will was

formerly requisite, *v. e.*, in all devises of real property, other than chattels real, the probate or an office copy thereof is made evidence of the will, unless, within four days of receipt of notice that such proof will be given (which notice must be given ten days before trial), the party receiving gives notice that he disputes its validity. By sect. 65, if the original will be produced, the judge may direct by which of the parties the costs of such production and proof shall be paid.

(*s*) 1 Inst. 111, a. See *ante*, p. 626.

been brought, it was held, that the executor took as executor, and not as legatee; and then the remainder over was not executed, and that it was incumbent on the remainderman to prove a special assent thereto, as to a legacy; whereupon plaintiff proved payment of the 50*l.*; and that was held to be a sufficient assent, and the plaintiff recovered (*t*). To prove the title of the plaintiff in ejectment, claiming as executor, the will was produced from the registrar's office, with a memorandum at the foot of it, signed by the surrogate, that the executor had proved the will, and that the probate had been sealed. The probate was not produced or accounted for; but it was proved that such a memorandum was never made till probate had been granted, and that, by the practice of the particular court, no other record of such grants was kept. The evidence was held sufficient (*u*).

Administrator.—Where the plaintiff claims title as administrator, in strictness he ought to produce the letters of administration under the seal of the Ecclesiastical Court—now the Court of Probate, established by the 20 & 21 Vict. c. 77 (see sect. 23). But before that act it was held that the original book of acts, wherein the orders of the Ecclesiastical Court for granting letters of administration were entered (*x*), or an examined copy of the entry in that book (*y*), or a certified copy of such book, under the 14 & 15 Vict. c. 99, s. 14 (*z*), or an exemplification of the letters of administration, if the originals were lost (*a*), were also evidence.

Boundary.—Reputation is admissible evidence in questions of boundary. Hence where the question was, whether land was in the parish of A., or in the parish of B., the land in B. being tithe-free; it was held, that ancient leases granted by the ancestor of the plaintiff's landlord, in which the land was described as being in parish B., were admissible as evidence of reputation that the land was in that parish (*b*). So verdicts and presentments at a manor court are admissible, but not awards (*c*).

Copyholds.—If the plaintiff make title in the lessor as lord of a manor, who has a right by forfeiture of copyhold, he ought to prove that his lessor is lord, and the defendant a copyholder; and that he committed a forfeiture: but the presentment of the forfeiture need not be proved, nor the entry or seizure of the lord for the forfeiture (*d*).

Tenant by Elegit.—As under an elegit the sheriff cannot deliver the land extended (*e*), the tenant by elegit must bring an eject-

(*t*) *Young v. Holmes*, 1 Str. 170.

(*u*) *Doe v. Mew*, 7 A. & E. 240.

(*x*) *Elden v. Keddell*, 8 East, 187.

(*y*) *Ray v. Clerk*, 13 East, 238.

(*z*) *Dorrett v. Meux*, 15 C. B. 142.

(*a*) *Shepherd v. Shorthose*, 1 Stra. 412.

(*b*) *Plaxton v. Dare*, 10 B. & C. 17.

(*c*) *Evans v. Rees*, 10 A. & E. 151. See *Daniel v. Wilkin*, 7 Exch. 429.

(*d*) *Peters v. Mills*, Bull. N. P. 107.

(*e*) Per Lord Kenyon, C. J., in *Taylor v. Cole*, 3 T. R. 295.

ment (*f*) ; to support which he must either produce in evidence an examined copy of the judgment ; of the writ of elegit taken out upon it, and the inquisition and return thereupon ; or an examined copy of the judgment roll, containing the award of elegit and return of the inquisition (*g*). If the writ of elegit is bad on the face of it, as if it be sued out for part only of the sum recovered without showing that the residue has been satisfied or otherwise disposed of (*h*), the objection may be taken at the trial at Nisi Prius (*i*). If at the time of the judgment the elegit debtor is entitled to the whole property sought to be recovered in the ejectment by the elegit creditor, other parties, who with the elegit debtor are in possession when the ejectment is brought, must prove their title, and, if they do not, the elegit creditor is entitled to judgment against all (*k*). The writs, with the inquisition and return thereupon, stating that the defendant was possessed of the property, are sufficient evidence of the plaintiff's right to recover, and, it seems, conclusive as between the judgment creditor and judgment debtor, at all events down to the date of the return ; so that the defendant cannot set up a title in a third party (*l*).

A verdict was found for the plaintiff, who claimed under a judgment recovered against the defendant, and writ of elegit and inquisition thereon taken and returned. Upon motion to enter a nonsuit, the objection was, that by a deed executed before the judgment was recovered, the legal estate was vested in trustees for the purpose of securing an annuity to the defendant's mother, with permission to the defendant to take the rent, until the annuity should be in arrear. The trustees were empowered to enter in case the annuity were in arrear, which they had done. But at the time of the execution of the elegit, and of commencing the action, there was nothing in arrear. It was contended that the case fell within 29 Car. II. c. 3, s. 10 (by which the sheriff can take under an elegit such lands as the party against whom it issues is legally or beneficially entitled to), as the premises were held in trust for the defendant. It was adjudged that the plaintiff could not recover, because the estate was vested in trustees, though partly for the defendant's benefit (*m*).

(*f*) " I am aware that it has in several places been said, that the tenant by elegit cannot obtain possession without an ejectment, but I have always been of a different opinion. I have no doubt that the sheriff may deliver actual possession of a moiety (*all* now by 1 & 2 Vict. c. 110, s. 11), except that, *where the land is under a previous demise*, he cannot disturb the previous title of the tenant in possession. All he can do is to put the avowant into the state of landlord ; if the land had been in the possession of the former owner the sheriff might have delivered

actual possession ; where it is in the possession of a tenant the sheriff sets it out, &c., and the tenant is bound thenceforward to pay rent to the tenant by elegit." *Per Gibbs*, C. J., 6 Taunt. 206.

(*g*) *Ramsbottom v. Buckhurst*, 2 M. & S. 565.

(*h*) See *Sherwood v. Clark*, 15 M. & W. 764.

(*i*) *Fenny v. Durant*, 1 B. & Ald. 40.

(*k*) *Doe v. Owen*, 2 C. & J. 71.

(*l*) *Martin v. Smith*, 27 L. J., Exch. 317.

(*m*) *Doe v. Greenhill*, 4 B. & Ald. 684.

Judgment.—Where the plaintiff claims under an assignment from the sheriff, if he be a party in the original action in which the execution issues, he must not only produce the writ of *fi. fa.*, but also the judgment (*n*). A judgment recovered by the defendant in a former ejectment is admissible in evidence against the plaintiff, on the trial of a second ejectment, where the plaintiff and the defendant are the same parties, but it is not conclusive, because a party may have a title to possession at one time and not at another (*o*).

Landlord.—In ejectment by a landlord against his tenant, it is not necessary for the landlord to give any evidence of his title anterior to the lease; for the tenant will not be permitted to impeach the title of the person under whom he came into possession. In ejectment upon a clause of re-entry in a lease, for non-payment of rent, against the assignee of the term, the lessor proved, by the subscribing witness, the execution of the counterpart of the lease; this was held to be sufficient proof of the holding upon the condition of re-entry in case of non-payment of rent, without producing the lease itself, or proving that notice had been given to the defendant to produce it (*p*). So a lessee cannot dispute the admissibility or validity of the counterpart on the ground that the original is not properly stamped (*q*).

It is sufficient to prove the assignment of a lease by the subscribing witness, without calling the subscribing witness to the original lease (*r*). In this case the assignment was by indorsement. In ejectment for a leasehold estate, the lessor of the plaintiff produced the original lease, which was for a term of 1000 years, granted in the time of Queen Elizabeth, and one mesne assignment in the time of King James; and then proved possession in himself and those under whom he claimed for seventy years prior to the ejectment; it was held, that the jury might be directed to presume all the mesne assignments (*s*).

In ejectment by landlord against tenant, the landlord proved payment of rent and half a year's notice to quit. But on the cross-examination of the plaintiff's witness, he was asked, whether there was not an agreement in writing relative to the holding of these lands? to which he answered, that an agreement in writing relative to these lands was produced at the last trial of this ejectment (this being the second trial); but he did not know the contents of it; and then another witness was called, who proved that he had seen the same paper in the hands of the plaintiff's attorney, on the same morning (*i. e.* of this trial). Whereupon it was objected, on the part of the defendant, that no parol evidence

(*n*) *Doe v. Smith*, Holt, 589.

(*o*) *Doe v. Seaton*, 2 C. M. & R. 728.

(*p*) *Roe v. Davis*, 7 East, 363; *Houghton v. Koenig*, 18 C. 235, *acc.*

(*q*) *Paul v. Meek*, 2 Y. & J. 117.

(*r*) *Nash v. Turner*, 1 Esp. 217.

(*s*) *Earl v. Baxter*, 2 W. Bl. 1228.

of the tenancy could be given, when it appeared that there was an agreement in writing concerning it; and it did not appear that the landlord had any right to determine the tenancy in the manner he had done. Lord *Ellenborough*, C. J.,—"If there were any writing relative to this holding, in the possession of the landlord, the defendant ought to have given him a regular notice to produce it; otherwise, in this collateral way, he would get the whole benefit of it, without giving such a notice: when if notice had been given, and the paper were produced, it might not support the objection. Enough, at least, ought to appear to show that the paper not produced was better evidence of the terms of the tenancy than the evidence which was received; but it did not appear that it was an agreement between these parties, or that it was an existing agreement at this time; it might have been an agreement between the defendant and his former landlord; or it might have related to a former period of the tenancy. The witness did not profess to know any thing of the contents of the paper, only that it was an agreement relative to the lands in question" (t). But where the plaintiff's witness proved an acknowledgment by the defendant that he held under T., and stated that he (witness) had drawn an agreement touching the premises between plaintiff and T., it was held, that the plaintiff was bound to produce the writing or be nonsuit (u). "The rule is very clearly settled, that, if it comes out on the cross-examination of the plaintiff's witnesses that there is a written instrument, he must produce it, but if the plaintiff makes out a *prima facie* case without showing that there was any written contract, the other party, if he relies on that contract, must produce it;" (x); and if, when produced, it is inadmissible for want of a proper stamp, the plaintiff is entitled to a verdict (y).

Defendant enclosed a small piece of waste land by the side of a public highway, and occupied it for thirty years without paying any rent; at the expiration of that time the owner of the adjoining land demanded 6*d.* rent, which defendant paid on three several occasions; it was held, that this, in the absence of other evidence, was conclusive to show that the occupation of defendant began by permission, and entitled plaintiff to a verdict (z). This case was decided on the ground that the defendant's possession was not *adverse* to that of the plaintiff, a doctrine now abolished. (See *ante*, p. 654.) Such facts, however, would still, it seems, be admissible, as evidence of an assertion of right and act of ownership, acquiesced in by the tenant, on the part of the person to whom the rent was paid (a). The possession of the tenant is the possession of the

(t) *Doe v. Morris*, 12 East, 237; *Stevens v. Pinney*, 8 Taunt. 327, *acc.*

(u) *Penn v. Griffith*, 6 Bingh. 533; *Doe v. Harvey*, 8 Ib. 239.

(x) *Per Parke, J., R. v. Padstow*, 4

B. & Ad. 208.

(y) *Magnay v. Knight*, 1 M. & G. 944; *Fielder v. Reay*, 6 Bingh. 332.

(z) *Doe v. Wilkinson*, 3 B. & C. 413.

(a) *Doe v. Edwards*, 5 A. & E. 95.

owner (b); and a licensee is in this respect in the same position as a tenant (c). So where a cottage standing in a meadow (belonging to the lord of a manor), but separated from it and from the high road by a ditch, had been occupied for more than twenty years without payment of rent; then the lord demanded possession, which was reluctantly given; and the occupier was told, that if he were allowed to resume possession, it would only be during pleasure. He was allowed to resume, and kept possession for fifteen years more, but did not pay any rent; it was held, that it was a question for the jury, whether the possession commenced and continued by adverse title, or by the permission of the lord: and the jury having found that the occupation was by permission of the lord, the court refused to disturb the verdict (d). This case was also decided on the ground of *adverse* possession, but similar circumstances would still (*seem*) entitle the plaintiff to a verdict; for, under the 3 & 4 Will. IV. c. 27, a right of entry accrues on the resumption of possession (e). In that case, however, the twenty years had not expired before the resumption of possession.

Where the question was, whether a slip of land between some old inclosures and the highway vested in the lord of the manor or in the owner of the adjoining freehold; it was held, that evidence might be received of acts of ownership by the lord of the manor, on the greens and wastes in other parts of the manor, at a distance, although the lord was not the owner of the adjoining freehold, provided such evidence were confined to the road, which passed by the spot claimed by the plaintiff (f). So, although not lying along the same road, if they are contiguous to or communicate with open commons or larger portions of waste land of a manor; for the evidence which applies to the larger portions in that case applies also to the narrow strip which communicates with them (g). But the mere fact that on other parts of the waste of the manor, situate between a private enclosure and a public road, the lord has exercised acts of ownership, is not sufficient (h).

Payment of the same and a small sum of money, annually, for a long series of years, for a piece of land, to the lord of a manor, has been held not to be evidence of a title to the land, but to the rent only. It had been paid nearly forty years, and the judge said, the presumption was, that it was a quit rent (i).

Where the plaintiff proved that the premises had been leased to him and a year's possession, and that the defendant ousted him; this was held sufficient, although it was not shown what the title of the demising parties was; the defendant being a mere wrong-doer (k), and this, although the plaintiff sets up a title which he fails to

(b) *Bushby v. Dixon*, 3 B. & C. 298

(c) *Doe v. Baytop*, 3 A. & E. 188.

(d) *Doe v. Clark*, 8 B. & C. 717.

(e) *Randall v. Stevens*, 2 E. & B. 641.

(f) *Doe v. Kemp*, 2 B. N. C. 102;

Dendy v. Simpson, 18 C. B. 831, *acc.*

(g) *Grose v. West*, 7 Taunt. 39.

(h) *Doe v. Kemp*, p. 107, *per Cur.*

(i) *Doe v. Johnson*, Gow. 173.

(k) *Doe v. Dyeball*, M. & Malk. 346.

establish (*l*). The plaintiff proved, that his father and himself had held the premises for twenty-two years, and during that time received and increased the rent. It did not appear that the father had any other son. The defendant proved, that he had been in possession for ten years before ejectment brought. Held, that the plaintiff was entitled to recover; *Tindal*, C. J., observing, that the earlier presumption must prevail, until better title is shown (*m*). But care must be taken in these cases not to prove too much, for where the plaintiff proved thirteen years' possession, which it was admitted by the court would have entitled her to a verdict as *prima facie* evidence of a seisin in fee, no other interest appearing in proof, but proved *also*, that her husband had been in possession for eighteen years previously, and had died, leaving children; it was held, that she had established a *prima facie* case of title in his heir, and by her own showing had proved the title to be in another, of which the defendant, though producing no evidence of title in himself, was entitled to take advantage. Nonsuit accordingly (*n*).

Legitimacy.—In this action, the legitimacy of the parties frequently comes in question. An opinion appears to have prevailed at one time, that unless the husband was out of the kingdom during all the time of the wife's going with child, access must be presumed, and the child must be deemed legitimate (*o*). But, on examination of this doctrine, it was found unsatisfactory; and it is now held, that non-access may be proved to bastardize the issue, although it should appear that the husband was within the kingdom during the period of gestation (*p*). So where the husband, in the course of nature, cannot have been the father of his wife's child, the child is by a law a bastard, whether the husband be within reach of access or not; as in the case of a natural impossibility, the husband being within the age of puberty (*q*); or disabled by bodily infirmity (*r*). So where it was proved that the husband had not access, until a fortnight before the birth of the child, the child was adjudged illegitimate (*s*). The circumstance of the wife living in notorious adultery is not sufficient evidence alone of the husband's non-access to warrant a finding of illegitimacy (*t*).

The wife is a witness of necessity, as to the fact of adulterous intercourse, because that lies within her own knowledge, and she is the only person who may be supposed privy to it, except the adulterer (*u*). But *non-access* must be proved by other testimony than that of the wife (*x*); and this rule holds, although the husband

(*l*) *Davison v. Gent*, 1 H. & N. 744.

(*m*) *Doe v. Cooke*, 7 Bingh. 346.

(*n*) *Doe v. Barnard*, 13 Q. B. 945.

(*o*) *Queen v. Murrey*, Salk. 122.

(*p*) *R. v. Bedall*, 2 Str. 1076.

(*q*) 1 Hen. VI. 3, b.

(*r*) 1 Roll. Abr. 359 (B.) 18.

(*s*) *R. v. Luffe*, 8 East, 193.

(*t*) *R. v. Mansfield*, 1 Q. B. 444.

(*u*) *R. v. Rook*, 1 Wils. 340.

(*x*) *R. v. Reading*, Rep. Temp. Hardw.
79.

be dead (x). It is clear and indisputable law, that, for the purpose of proving non-access, neither husband nor wife can be a witness; and this rule excludes all questions which have a tendency to prove access or non-access (y). This rule is founded "on decency, morality, and policy," *per Mansfield, C. J.* (z); and is not, it seems, affected by the recent statutes to amend the law of evidence (a).

The fact of the birth of a child from a woman united to a man by lawful wedlock, is generally, by the law of England, *prima facie* evidence, that such child is legitimate. Such *prima facie* evidence of legitimacy may be rebutted by satisfactory evidence that such access did not take place between the husband and wife, as by the laws of nature is necessary, in order for the man to be in fact the father of the child. The physical fact of impotency, or of non-access, or of non-generating access, as the case may be, may always be proved by means of such legal evidence as is admissible in every other case in which it is necessary, by the law of England, that a physical fact be proved. After proof given of such access of the husband and wife, by which, according to the laws of nature, he might be the father of a child, (by which is to be understood proof of sexual intercourse between them,) no evidence can be received, except it tend to falsify the proof that such intercourse had taken place. Such proof must be regulated by the same principles as are applicable to the establishment of any other fact. In every case where a child is born in lawful wedlock, the husband not being separated from his wife by a sentence of divorce, sexual intercourse is presumed to have taken place between the husband and wife, until that presumption is encountered by such evidence as proves, to the satisfaction of those who are to decide the question, that such sexual intercourse did not take place at any time when, by such intercourse, the husband could, according to the laws of nature, be the father of such child. Where the legitimacy of a child in such a case is disputed, on the ground that the husband was not the father of such child, the question to be left for the jury is, whether the husband was the father of such child; and the evidence to prove that he was not the father, must be of such facts and circumstances, as are sufficient to prove, to the satisfaction of a jury, that no sexual intercourse took place between the husband and wife at any time when, by such intercourse, the husband could, by the laws of nature, be the father of such child (b). A child begotten after a divorce *a mensâ et thoro* (c), shall be taken to be a bastard; otherwise after voluntary separation, unless found that the husband had no access (d).

(x) *R. v. Kea*, 11 East, 132.

(y) *R. v. Sourton*, 5 A. & E. 180.

(z) *Goodright v. Moss*. Cowp. 594.

(a) *Legge v. Edmunds*, 25 L. J., Ch. 125.

(b) *Banbury Peerage*, 1 Sim. & Stu.

153.

(c) Now, a judicial separation. 20 & 21 Vict. c. 85. See sect. 7.

(d) *Parishes of St. George and St. Margaret's, Westminster*, 1 Salk. 123.

Upon the question of marriage, it is part of the law of England that the law of the country where the marriage is solemnized shall be adopted; and the same observation applies to the distribution of personal property according to the law of the domicile. But the same principle does not apply to the inheritance of real property; to that the *lex loci* is alone applicable. Legitimacy, according to the law of a foreign country, is not sufficient to make a person inherit socage lands in England; the heir must, in accordance with the law of this country, be a child born after marriage. Hence a child born in Scotland of unmarried parents, domiciled in that country, and who afterwards intermarry there, is not by such marriage rendered capable of inheriting lands in England (e).

Mortgagee.—In ejectment by a mortgagee, if the mortgagor be in possession, proof of the execution of the mortgage deeds by the subscribing witness will be sufficient to support the mortgagee's title; but if a third person is in possession (under a lease prior to the mortgage) the mortgagee should also prove, that such third person has paid rent to, or otherwise acknowledged the title of, the mortgagor (f); and that his tenancy has been determined by a notice to quit, forfeiture, or otherwise (g). It is not necessary to prove either a notice to quit or a demand of possession against a mortgagor (h), he being only a tenant on sufferance (i), unless the mortgage deed contains any proviso, amounting in effect to a re-demise for a certain period, or a tenancy from year to year, or at will (k). A tenant let into possession subsequent to the mortgage, without the privity of the mortgagee, cannot be in a better position in this respect than the mortgagor (l); and no notice to quit on demand of possession is necessary (m). Where, however, the mortgagee recognizes a party as being in lawful possession of the premises at a given time, it is not competent to him to say afterwards that at that time he was a trespasser (n); but mere payment of interest by the mortgagor in respect of the original debt, for a period covering the date mentioned in the writ, is not a recognition of the right of the mortgagor, or his tenant, to hold possession (o).

Rector.—In ejectment by a rector for a rectory, it seems that it is not necessary for the plaintiff to prove that he subscribed and publicly read the Thirty-nine Articles; for where any act is required to be done, so that the party neglecting it would be guilty of a criminal neglect of duty in not having done it, the law presumes the affirmative, and throws the burthen of proving the con-

(e) *Doe v. Vardill*, 5 B. & C. 438;
(*Dom. Proc.*) 6 B. N. C. 385.

(f) *Peake's Evid.* 324.

(g) *Doe v. Wharton*, 7 T. R. 2.

(h) *Doe v. Giles*, 5 Bingh. 421.

(i) *Doe v. Masse*, 8 B. & C. 767.

(k) *Doe v. Goldwin*, 2 Q. B. 141.

(l) *Weaver v. Belcher*, 3 East, 449.

(m) *Keech v. Hall*, 1 Dougl. 21.

(n) *Doe v. Hales*, 7 Bingh. 322.

(o) *Doe v. Cadwallader*, 2 B. & Ad.

trary on the other side (*p*). Hence, where a prebendary brought ejectment for a house, belonging to his prebend, and was required to show that he had performed the requisites necessary by law to make him prebendary; *Wilmot, J.*, held, that it ought to be presumed that he had performed them, until something appeared to the contrary (*q*).

The parish register, or an examined copy thereof, or a certified copy, under 14 & 15 Vict. c. 99, s. 14, will be evidence to prove baptisms, marriages, or burials. A register of baptism is not, *per se*, evidence of the place of the birth of the party baptized (*r*). Reputation is sufficient evidence of marriage, even where the party adducing it seeks to recover as heir at law to his brother, the person last seised, and the father is still living (*s*). Under the 6 & 7 Will. IV. c. 86, for providing means for a complete register, by sect. 38, certified copies of entries, sealed or stamped with the seal of office, are to be received as evidence of the birth, death, or marriage, to which the same relates, without any further or other proof of such entry.

If persons for whose lives estates have been granted, remain beyond the seas, or absent themselves in this realm, for seven years together, and no sufficient proof be made of the lives of such persons, in any actions commenced by the lessors or reversioners for the recovery of the estates, they shall be accounted as naturally dead, and the judge shall direct the jury accordingly. 19 Car. II. c. 6. Proof of absence in such a case may be given by a person residing near the estate, though not a member of the family (*t*). Where a party has been absent seven years without having been heard of, he is presumed, at common law, to be dead; but there is not any legal presumption as to the particular time of his death within that period. The presumption of law relates only to the fact of death; the *time* of death, whenever it is material, must be the subject of distinct proof (*u*).

The original visitation-books of heralds, compiled when progresses were solemnly and regularly made into every part of the kingdom, to inquire into the state of families, and to register such marriages and descents as were verified to them on oath, are allowed to be good evidence of pedigrees (*x*). But a pedigree purporting to be compiled from monumental inscriptions, family records, and history, is not admissible, except for the purpose of showing the relationship of those persons who were described by the framer of the pedigree as living, and who might be presumed to be personally known to him (*y*).

(*p*) See *Monk v. Butler*, 1 Roll. Rep. 83; *Williams v. East India Company*, 3 East, 199.

(*q*) *Sherard's case*, cited 2 W. Bl. 853.

(*r*) *R. v. North Petherton*, 5 B. & C. 508.

(*s*) *Doe v. Fleming*, 4 Bingham. 266. As

to marriage, see *ante*, tit. "Adultery."

(*t*) *Doe v. Deakin*, 4 B. & Ald. 433.

(*u*) *Nepean v. Doe*, 2 M. & W. 914.

(*x*) *Matthew v. Port*, Comb. 63.

(*y*) *Davies v. Lowndes*, 5 B. N. C. 167: (in error) 6 M. & G. 471.

Although it is a general rule that hearsay evidence is not admissible; yet in some cases, where a strict adherence to that rule would utterly prevent the party from establishing his case, the law sanctions a departure from it. "Hearsay is good evidence to prove, who was my grandfather, when he married, what children he had, &c., of which it is not reasonable to presume that I have better evidence; so to prove that my father, mother, cousin, or other relation beyond the sea is dead; and the common reputation and belief of it in the family, gives credit to such evidence" (z). Where it was proved by one of the family, that, many years before, a younger brother of the person last seised had gone abroad, and according to the repute of the family had died, and that witness had never heard in the family of his having been married. This was held to be sufficient *primâ facie* evidence that the party was dead without lawful issue (a). So the declarations of the members of a family are received in evidence as to pedigrees; but evidence of what a mere stranger has said has ever been rejected in such cases (b). So the declarations of an illegitimate child have been rejected (c). So the dying declarations of a person, who had, as she stated, been servant to M. W., through whom the pedigree was traced, as to the relationship of the plaintiff to the person last seised, have been rejected (d). Declarations of servants and intimate acquaintances are not admissible; the rule is confined to members of the family (e).

The husband has been considered as a member of the wife's family within the exception; and, consequently, his declarations as to the illegitimacy of his wife are admissible in evidence (f). So a widow has been allowed to prove the declarations of her deceased husband in support of her son's title, although the husband, if living, would have had the right which the declarations went to establish (g). So declarations of a person entitled to a remainder upon failure of issue of the then possessor are admissible, although the title of the plaintiff was that which the person making the declarations would have had, if living (h). But in all cases, if it appears that the declarations have been made *post litem motam*, that is, not merely after the commencement of the suit, but after the dispute has arisen, they are not to be received (i). An inquiry before a Master in Chancery as to who was the proper person to be committee of a lunatic, and to certify who was his next of kin and heir at law, to whom notice was directed to be given, is not a *lis mota* within the above rule, and depositions of members of the

(z) Gilb. Ev. 212, edit. 1761.

(a) *Doe v. Griffin*, 15 East, 293; *Doe v. Woolley*, 8 B. & C. 22, acc.

(b) *Per Lord Kenyon*, C. J., in *R. v. Eriswell*, 3 T. R. 723.

(c) *Doe v. Barton*, 2 M. & Rob. 28.

(d) *Doe v. Ridgway*, 4 B. & Ald. 53.

(e) *Johnson v. Lawson*, 2 Bingh. 86;

see *Doe v. Davies*, 13 Q. B. 314.

(f) *Vowles v. Young*, 13 Ves. 143; *Doe v. Harvey*, Ry. & M. 297.

(g) Peerage case cited by *Abbott*, C. J., in *Doe v. Tarver*, Ry. & M. 141.

(h) *Doe v. Tarver*, *supra*.

(i) *Walker v. Beauchamp*, 6 C. & P. 560.

family taken upon oath before the Master upon such an inquiry are admissible (*k*).

An entry in an almanack, by the father, of the *time* of the birth of his son, has been admitted to be good evidence, to show that the son was under age at the time of making his will; on the ground, as it should seem, of the peculiar means of knowledge of the fact by the father, and the absence of all interest in him at the time of the memorandum made (*l*). A *written* memorandum (*m*), by a deceased accoucheur, stating that he had delivered a woman of a child on a certain day, and referring to his ledger, in which a charge for his attendance on that occasion was marked as *paid*, was held to be good evidence, upon an issue as to the child's age; on the ground, that if a person have peculiar means of knowing a fact, and make a declaration of that fact, which is against his interest, it is evidence after his death (*n*). It will be observed, that in this case, the memorandum of the payment of the midwife's charge was held to be evidence of the *date* of the birth (*o*); so the entry of charges paid for a lease, as drawn on a certain day, was held to be evidence that the lease was drawn on that day, which proof by an eye-witness of the same payment on account of such charges would not have been; and there are other cases to the same effect. The result of these authorities is, that the entry of a payment against the interest of the party making it, may have the effect of proving the truth of other statements contained in the same entry, and connected with it (*p*). So receipts are evidence not only of the fact of payment having been made, but also of the account on which it was made (*q*). The rule that entries of receipts are admissible, because against the interest of the party making them, does not apply to entries in discharge of the party making them, for they make *for* his interest (*r*).

Bills in equity, whether seeking relief or not, and depositions, are not admissible as evidence of the facts therein mentioned or as *declarations respecting pedigree*; nor are depositions taken in the Court of Chancery, in consequence of a bill to perpetuate the testimony of witnesses, or otherwise, receivable in evidence to prove the facts sworn to, in any cause in which the parties are not the same as in the cause in the Court of Chancery, or do not claim under some or one of such parties; and, generally speaking, a bill in Chancery cannot be received in evidence in a court of law, to prove any fact either alleged or denied in such bill: though to this there may be some exceptions (*s*). Where the plaintiff tendered

(*k*) *Gee v. Ward*, 7 E. & B. 509.

(*l*) *Herbert v. Tuckal*, Sir T. Raym. 84.
See *per Ellenborough*, C. J., in *Roe v. Rawlings*, 7 East, 290.

(*m*) That an *oral* declaration is admissible (*semble*). *Stapylton v. Clough*, 2 E. & B. 933.

(*n*) *Higham v. Ridgway*, 10 East, 116.

See *Gleadow v. Atkins*, 1 Cr. & M. 423.

(*o*) *Doe v. Robson*, 15 East, 32.

(*p*) *Per Parke*, B., *Davies v. Humphreys*, 6 M. & W. 166.

(*q*) *Per Parke*, B., *Percival v. Nanson*, 7 Exch. 4.

(*r*) *Doe v. Bevis*, 7 C. B. 456.

(*s*) *Banbury Peerage*, D. P., opinions of

in evidence the answer of the defendant to a bill in equity, and the defendant insisted that the bill should be produced and read (*t*), *Tindal*, C. J., said, he thought he must order the whole bill to be read if the defendant required it, though it was certainly unusual to require this to be done; and he should tell the jury, that the statements in the bill were not to be considered as admissions of the facts so stated, it being notorious that allegations, not corresponding with the facts, were frequently introduced into bills for the purpose merely of eliciting the truth from the other party.

If the question be, whether a certain manor be ancient demesne or not, the trial shall be by Domesday Book, which will be inspected by the court (*u*). An ancient writing, found among the court rolls of a manor, stated to be *ex assensu omnium tenentium*, and proved to have been delivered down from steward to steward, is admissible evidence, although not signed by any person, to prove the course of descent within the manor (*x*); for the quality of the hearsay itself raises a natural inference that it was derived from persons acquainted with the subject (*y*). And the same rule holds with respect to an entry in the court rolls of a presentment, made by the homage, of the customary mode of descent within the manor, although no instances be proved of any person having taken according to the mode of descent pointed out in the presentment (*z*). Custom is of the very essence of a copyhold; and if the custom be silent the common law must regulate the course of descent. Customs are to be taken strictly, and cannot be extended by implication. Hence, where the custom is, that the elder sister shall inherit, yet, by that custom, the eldest aunt of the eldest niece shall not inherit the land (*a*). So if the custom be that the *youngest son* shall inherit, and a man has issue two sons and dies, and the land descends to the younger son, who dies without issue, the *eldest son* of the *eldest brother* shall have the land; because the custom does not hold in the transversal line, but only in the lineal descent (*b*). Evidence of reputation of the custom of the manor, that, in default of sons, the *eldest daughter*, and in default of daughters, the *eldest sister*, and in case of the death of all, the *descendants* of the eldest daughter or sister respectively of the person last seised should take, is proper to be left to the jury of the existence of such a custom, as applied to a *great nephew* (the grandson of an eldest sister) of the person last seised; although the instances in which it was proved to have been put in use extended no further than those of eldest daughter and eldest sister, and the son of an eldest sister (*c*). On a question as to the

the judges, 30th May, 1809. See remarks on this case in *Gee v. Ward*, 7 E. & B. 509.

(*t*) *Pennell v. Meyer*, 2 M. & Rob. 98.

(*u*) Hob. 188.

(*x*) *Denn v. Spray*, 1 T. R. 466.

(*y*) See *Freeman v. Phillips*, 4 M. & S.

486.

(*z*) *Roe v. Parler*, 5 T. R. 26; *Crease v. Barrett*, 1 C. M. & R. 919, *acc.*

(*a*) *Ratcliff v. Chapman*, 4 Leon. 242.

(*b*) 1 Roll. Abr. 624, pl. 2.

(*c*) *Doe v. Sisson*, 12 East, 62.

existence of a custom in a particular manor, evidence of a like custom in an adjoining manor, though within the same parish and leet, is not admissible (*d*).

To an indenture of feoffment by the Bank of England, the seal of the bank was affixed by a paper, wafered to the indenture, on which was written, "Sealed by order of the Court of Directors of the Governor and Co. of the Bank: J. K., Secretary:" it was held, that J. K. was not an attesting witness, and that the execution of the feoffment might be proved by the seal, without calling J. K. (*e*); but the seal should, it seems, be proved to be the seal of the corporation (*f*).

For the Defendant.—If the defendant prove a title out of the plaintiff, it is sufficient, though he have not any title himself: but he ought to prove a subsisting title; for producing an ancient lease for 1000 years will not be sufficient, unless he likewise prove possession, under such lease, within twenty years (*g*). So if the defendant produce a mortgage deed, where the interest has not been paid, and the mortgagee never entered, it will not be sufficient to defeat the plaintiff, who claims under the mortgagor; because it will be presumed that the money was paid at the day, and consequently, that it is not a subsisting title; but if the defendant prove interest paid upon such mortgage, after the time of redemption, and within twenty years (see *ante*, p. 658), it will be sufficient to nonsuit the plaintiff (*h*). And the rule is the same if the plaintiff prove the title out of himself (*i*). No less time than twenty years will raise a presumption that a mortgage term has been assigned or surrendered; although the defendant does not prove that interest continues to be paid (*k*). *Note*, that in this case the defendant had possession of the mortgage deed.

The defendant produced a mortgage for years, by deed, from the plaintiff's ancestor, upon which was an endorsement in *hæc verba*, "Received of M. O. 500*l.* on the within recited mortgage, and all interest due to this day; and I do hereby release to the said M. O., and discharge the mortgaged premises from the said term of 500 years." On a case reserved, the court held, that these words amounted to a surrender of the term; and that such surrender might be by note in writing, without deed, by the Statute of Frauds, 29 Car. II. c. 3, s. 3 (*l*). By 8 & 9 Vict. c. 106, s. 3, a surrender in writing of an interest in any hereditaments not being

(*d*) *Marquis of Anglesey v. Lord Hatherton*, 10 M. & W. 218.

(*e*) *Doe v. Chambers*, 4 A. & E. 410. But now by the Com. Law Proc. Act, 1854, s. 26, it is "not necessary to prove by the attesting witness any instrument to the validity of which attestation is not requisite."

(*f*) *Moises v. Thornton*, 8 T. R. 307,

per Lawrence, J. See 8 & 9 Vict. c. 113.

(*g*) Bull. N. P. 110.

(*h*) *Wilson v. Witherby*, Bull. N. P. 110.

(*i*) *Doe v. Barnard*, 13 Q. B. 945, *ante*, p. 672.

(*k*) *Doe v. Calvert*, 5 Taunt. 170.

(*l*) *Farmer v. Rogers*, Bull. N. P. 110.

copyhold, "and not being an interest which might by law have been created without writing," shall be void, unless made by deed. The Statute of Frauds excepted surrenders by act or operation of law, which, therefore, being valid, though not made "by note in writing" within that act, need not now be made by deed. Any instrument in writing used as evidence of a surrender must be duly stamped (under 13 & 14 Vict. c. 97 (*m*)). Such an indorsement as the above, however, would, without a stamp, be evidence of the satisfaction of the term within the 8 & 9 Vict. c. 112, and, therefore, the defendant relying on possession only (see the facts stated 2 Wils. 26), would entitle the plaintiff to a verdict, as the law stands at present (*n*).

XI. Verdict—Judgment, &c.

Verdict.—By sect. 180 of the Common Law Procedure Act, 1852, the question at the trial is, whether the statement in the writ of the title of the claimants is true or false; "*and if true, then which of the claimants is entitled, and whether to the whole or part, and if to part, then to which part of the property in question,*" and the verdict is to be entered accordingly. In cases of joint tenants, tenants in common, and coparceners, the additional question, of whether an actual ouster has taken place, shall be tried. Sect. 188.

Previous to the above act, in an ejectment for a messuage, where it was found that a small part of the house was built, by encroachment, upon the land of the plaintiff, and not the residue, yet the plaintiff recovered for that parcel by the name of a messuage (*o*). So where the declaration was of a fourth part of a fifth part; and the title of the plaintiff was only to one-third of one-fourth of one-fifth, being only one-third of what was declared for, and it was said, that the plaintiff could not have a verdict, because the verdict ought to agree with the declaration;—but *per Cur.*, the verdict may be taken according to the title (*p*). So where the declaration was for a moiety of land; and the question was, whether the plaintiff could recover a third part, *per Lord Mansfield*, C. J.,—"The plaintiff shall recover according to his title, and it is not any objection to his recovering what he has really a title to, that he has demanded more, though the reverse, indeed, will not hold, *viz.*, that if he demands *less*, he shall, nevertheless, be entitled to recover *more*" (*q*). So if an ejectment be brought for 100 acres, plaintiff may recover forty (*r*). If the jury find for the

(*m*) *Williams v. Sawyer*, 3 B. & B. 70.

(*n*) *Doe v. Mousdale*, 16 M. & W. 689.

(*o*) Roll. 2 Abr. 704, pl. 22.

(*p*) *Ablett v. Skinner*, 1 Sidf. 229.

(*q*) *Denn v. Purvis*, 1 Burr. 326, and

MS.; see Comb. 101.

(*r*) *Guy v. Rand*, Cro. Eliz. 12. See *Meredith v. Rand*, Dyer, 115, b., pl. 67, in marg.

plaintiff for part, they should find as to the residue for the defendant (s). As between landlord and tenant, the jury may also find a verdict for the amount of the damages for mesne profits down to the day of trial or some previous day; Common Law Procedure Act, 1852, s. 214, *post*, p. 685; but this is at the option of the landlord, who may exercise such option at the trial, although the writ and issue do not contain any claim in respect of them (t). It is not necessary for him, in such case, to prove due notice of trial (u).

If the title of the claimant appear to have existed as alleged in the writ, and at the time of service thereof, but has expired before trial, the claimant is entitled to a verdict accordingly, and to a judgment for his costs of suit. Common Law Procedure Act, 1852, s. 181. If the defendant appears and the claimant does not appear, the claimant shall be nonsuited. If the claimant appears and the defendant does not appear, the claimant shall be entitled to recover as heretofore without any proof of his title. Sect. 183. By 114 R. G., H. T. 1853—If the plaintiff appears and the defendant does not appear, the defendant shall be taken to have admitted the plaintiff's title, and the verdict shall be entered for the plaintiff without producing any evidence, and the plaintiff shall have judgment for his costs as in other cases. By 30 Pl. R., T. T. 1853—If the plaintiff appear and the defendant does not appear, the plaintiff shall be entitled to a verdict without producing any evidence, and shall have judgment for costs as in other cases.

Judgment.—Upon a finding for the claimant, judgment may be signed and execution issue for the recovery of the possession of the property, or such part thereof, as the jury shall find the claimant entitled to, and for costs, within such time not exceeding the fifth day in term after the verdict, as the court or judge before whom the cause is tried shall order; and if no such order be made, then, on the fifth day in term after the verdict, or within fourteen days after such verdict, whichever shall first happen. Sect. 185. Upon a finding for the defendants, or any of them, judgment may be signed and execution issue for costs against the claimants named in the writ, within such time, &c. (as in the preceding section). If the plaintiff be nonsuited, the defendant shall be entitled to judgment for his costs of suits, 29 Pl. R., T. T. 1853. If the defendant wishes to move for a new trial, he should apply to the judge for an order to stay judgment and execution until the fifth day of next term (v). When a landlord obtains a verdict against a tenant who has found security for costs and damages under sect. 213, the judgment cannot be stayed by order of the judge, unless

(s) *Doe v. Ellis*, 13 M. & W. 241.

(t) *Smith v. Tett*, 9 Exch. 307.

(u) *Thompson v. Hodgson*, 12 A. & E. 135.

(v) Cole on Ejectment, 336.

the verdict be, in the opinion of the judge, contrary to evidence, or the damages excessive, or by consent, or except the defendant shall find security not to commit waste, sell standing crops, &c. Sect. 215.

Where an infant defendant appeared by attorney and not by guardian, this was held to be error in fact, for which the judgment must be reversed as to all the defendants in the action (*x*).

The court will make every possible intendment to support the judgment. A bare possibility of title, consistent with the judgment, will be sufficient (*y*).

Execution.—It was formerly the practice for the plaintiff to indemnify the sheriff (*z*), but the sheriff could not demand it (*a*), and it is not now usual (*b*). The sheriff delivers possession at the showing of the plaintiff, who is, at his peril, to take possession of no more than he is entitled to (*c*). If the plaintiff take out execution for more than the recovery warrants, the court will interpose in a summary way, and restore the tenant to the possession of such part as was not recovered (*d*). By the 221st section of the Common Law Procedure Act, 1852, the equitable jurisdiction theretofore exercised by the court over actions of ejectment, “so as to ensure a trial of the title and of actual ouster when necessary, only, and for all other purposes for which such jurisdiction may at present be exercised,” is expressly preserved, and the statutes not inconsistent with the Act are to remain in force and be applied thereto. If the execution be for twenty acres, the sheriff must give possession of twenty acres, according to the estimation of the county where the lands lie (*e*). It is at the election of the plaintiff whether the sheriff shall *return* the writ of *hab. fac. poss.* or not (*f*). But the sheriff is bound to *execute* the writ when he is required to do it, and nothing occurs to prevent him: and where, in taxing costs, the master disallowed certain expenses, on the ground that the writ was not executed; it was held, that the costs which were disallowed through the sheriff’s default in not executing the writ might be recovered in an action on the case against the sheriff (*g*). The court will not oblige the sheriff to return it, except at the instance of the plaintiff. But, after possession has been given under the writ, the plaintiff cannot sue out another writ, although he is disturbed by the same defendant, and though the sheriff have not returned the former writ; for an alias cannot issue after a writ is executed; if it could, the plaintiff, by omitting to call on the sheriff to make his return to the writ,

(*x*) *Greene v. Leclerc*, Ir. R. C. L. 1, 457.

(*y*) *Morres v. Barry*, 2 Str. 1180; *Roe v. Power*, 2 N. R. 1.

(*z*) *Gilb. Eject.* 110.

(*a*) See *Mason v. Paynter*, 1 Q. B. 974.

(*b*) *Cole on Ejectment*, 345.

(*c*) *Connor v. West*, 5 Burr. 2673.

(*d*) 1 Burr. 629; *per Lord Mansfield*, C. J., *Doe v. Dawson*, 3 Wils. 49.

(*e*) 1 Roll. Abr. 886, (H.) pl. 4.

(*f*) *Molineux v. Fulgam*, Palm. 289.

(*g*) *Mason v. Paynter*, 1 Q. B. 974.

might retain the right of suing out a new *hab. fac. poss.*, as a remedy for any trespass which the same tenant might commit within twenty years next after the date of the judgment (*h*). But he may in such a case apply to the court for a rule for a fresh writ (*i*). A writ of possession is not necessary, if the defendant acquiesces in the judgment, and goes out of his own accord (*k*).

Costs.—The court will, in the exercise of their equitable jurisdiction, compel the real defendant to pay the costs, although he is not a party to the record (*l*); but it must be shown that the defence was conducted for his benefit, and it is not enough to show that he is interested, as an equitable mortgagee of part of the premises, and that he has endeavoured to make terms with the plaintiff since the judgment (*m*). Where three ejectments were brought against a landlord and his two tenants, and the landlord obtained a rule for the consolidation of the three actions, and that the ejectment against one of the tenants (a pauper) should abide the event of the ejectment against the other, and that action was tried, and the plaintiff obtained judgment, and took possession of all the three tenements, the court compelled the landlord to pay the costs of that ejectment (*n*). One of several defendants in ejectment appear to defend in respect of part of the premises claimed, but he did not confess plaintiff's title under s. 205, and plaintiff obtained a general verdict against all the defendants. It was held, that he was liable to the general costs of the action as well as the cost of his own particular defence (*o*).

XII. *Error.*

By the C. L. P. Act, 1852, s. 208 (*p*), error may be brought after a special verdict, bill of exceptions, or by consent after a special case (*q*), but execution shall not be thereby stayed, unless the plaintiff in error shall within four days of lodging the memorandum of error, or after judgment, or before execution, be bound to the claimant in double the yearly value of the property, and double the costs recovered, on condition to pay such costs, damages, and sums of money, as shall be awarded, upon or after such judgment affirmed, or discontinuance. Although the words of the statute seem to require a recognizance *by the plaintiff in*

(*h*) *Doe v. Roe*, 1 Taunt. 55; but see *Kingsdale v. Mann*, 1 Salk. 321.

(*i*) *Doe v. Roe*, 2 D. N. S. 407.

(*k*) *Wilkinson v. Kirby*, 15 C. B. 430; *per Parke, B.*, 11 Exch. 32.

(*l*) *Doe v. Gray*, 10 B. & C. 615; *Hutchinson v. Greenwood*, 4 E. & B. 324, *acc.*

(*m*) *Anstey v. Edwards*, 16 C. B. 212.

(*n*) *Thrustout v. Shenton*, 10 B. & C.

110.

(*o*) *Johnson v. Mills*, L. R. 3, C. P. 22.

(*p*) This is substantially a re-enactment of 16 & 17 Car. II. c. 8, s. 3.

(*q*) By the Com. Law Proc. Act, 1854, s. 32, error may be brought upon a special case in the same manner as upon a special verdict, unless the parties agree to the contrary.

error himself, yet it has been held, that the intention of the legislature will be satisfied by the plaintiffs in error procuring responsible persons to enter into the obligation required (*r*). The plaintiff in error is not bound to give the defendant in error notice of his entering into the recognizance (*s*). By the same section, in case of affirmance or discontinuance, the court may, on the application of the claimant, issue a writ to inquire of the mesne profits, and of the damage by any waste committed after the first judgment; and are, on the return thereof, to give judgment, and award execution for the same, and costs. The bail in error are not chargeable for mesne profits in an action upon their recognizance, unless the amount be ascertained as above directed (*t*). In cases between landlord and tenant this security is *in addition* to the bail for the damages and costs required by section 213 (*u*).

XIII. *Of the Action of Trespass for Mesne Profits* (*x*).

The judgment in ejectment under the Common Law Procedure Act, 1852 (see Sched. A., Form 14 *et seq.*), is for the recovery of possession of the property and costs only; and no damages are recoverable except in cases between landlord and tenant under sect. 214, and then only at the option of the landlord. For the damage sustained by the plaintiff in being kept out of the rents and profits of the land, the law has provided another remedy, namely, by an action which may be brought by the plaintiff in ejectment against the person in actual possession, or the landlord who has been let in to defend the ejectment (*y*), for mesne profits. This action is, in form, one of trespass, because, by bringing ejectment, the plaintiff treats the defendant as a trespasser, on and from the day mentioned in the writ (*z*); and in it the plaintiff may declare, not only for the loss of the mesne profits, but also for the costs of the ejectment, where the case requires it, as after judgment for default of appearance to the writ (*a*) (sect. 177), or where the plaintiff has incurred costs in a court of error in reversing a judgment of ejectment obtained by the defendant (*b*). This action is local in its nature, and must be brought in the county where the lands lie. It may be brought by one tenant in common, who has recovered in an action of ejectment by default, against his companion (*c*).

(*r*) *Keene v. Deardon*, 8 East, 298.

(*s*) *Doe v. Goundry*, 7 Taunt. 427.

(*t*) *Doe v. Reynolds*, 1 M. & S. 247.

(*u*) *Roe v. Moore*, 7 Bingh. 124.

(*x*) This action is not maintainable after an award by an arbitrator of a certain sum for land which has been wrongfully taken by a railway company, an ejectment brought therefor, and the action and all matters in difference re-

ferred by an order of Nisi Prius to such arbitrator. *Smalley v. Blackburn Railway*, 27 L. J., Exch. 65.

(*y*) *Doe v. Challis*, 17 Q. B. 166.

(*z*) *Per Ashhurst, J., Birch v. Wright*, 1 T. R. 387.

(*a*) *Doe v. Huddart*, 2 C. M. & R. 316.

(*b*) *Nowell v. Roake*, 7 B. & C. 404.

(*c*) *Goodtitle v. Tombs*, 3 Wils. 118.

By the Common Law Procedure Act, 1852, s. 214 (*d*).—"Wherever it shall appear on the trial of any ejectment, at the suit of a landlord against a tenant, that the tenant or his attorney has been served with due notice of trial, the judge before whom such cause shall be tried shall, whether the defendant shall appear or not, permit the claimant, after proof of his right to recover possession of the premises mentioned in the writ, to go into evidence of the mesne profits, which shall or might have accrued from the determination of the tenant's interest to the time of the verdict, or to some preceding day to be specially mentioned therein: and the jury shall, in such case, give their verdict both as to the recovery of the premises, and also as to the amount of the damages to be paid for such mesne profits, &c. Provided that nothing hereinbefore contained shall be construed to bar any landlord from bringing any action for the mesne profits, which shall accrue from the verdict, or the day so specified, down to the delivery of possession of the premises recovered." See *ante*, p. 681.

Evidence.—The evidence necessary to support this action, after judgment against the tenant in possession is as follows:—an examined copy of the judgment in ejectment, or an office copy where the action is in the same court, and the parties are the same (*e*); proof of the length of time during which the defendant has, either actually or constructively, occupied; of the value of the mesne profits and of the costs of executing the writ of possession. Before the Common Law Procedure Act, 1852, where the judgment was against the tenant in possession after verdict, it was, it seems, sufficient to produce the judgment without proving actual entry by the plaintiff, either under the writ of possession, or otherwise; because, by entering into the consent rule, the defendant admitted lease, entry, and ouster (*f*). But where the judgment was by default against the casual ejector, *and so no rule entered into*, it was held, that the plaintiff could not maintain trespass without an actual entry, and, therefore, ought to prove the writ of possession executed (*g*). Since that act, therefore, the plaintiff should be prepared with an examined copy of the writ of possession and return of execution (*h*). But if the plaintiff has been let into possession by the defendant, that will supersede the necessity of proving that the writ of possession has been executed (*i*).

The judgment in ejectment will be conclusive evidence against the tenant in possession of the plaintiff's title, from the day mentioned in the writ thenceforward, unless its determination on some

(*d*) This is an adaptation of the 1 Geo. IV. c. 87, s. 2.

(*e*) Taylor on Evidence, sect. 1383.

(*f*) See *Doe v. Wright*, 10 A. & E. 763.

(*g*) *Thorpe v. Fry*, Bull. N. P. 87.

(*h*) See *per Parke, B.*, *Barnett v. Earl of Guildford*, 11 Exch. 32.

(*i*) *Wilkinson v. Kirby*, 15 C. B. 430.

subsequent day appear by the pleadings (*k*) ; consequently, in the action for mesne profits, it is not necessary for the plaintiff to be prepared with proof of title, except where he seeks to recover the profits antecedent to the day mentioned in the writ, or brings his action against a precedent occupier (*l*). But in order to render the judgment by default *conclusive* evidence of the title, it must be pleaded as an estoppel (*m*) ; for a judgment is in no case conclusive unless pleaded by way of estoppel (*n*).

If the plaintiff declares against the defendant for having taken the mesne profits for a longer period of time than six years before action brought, the defendant may plead the Statute of Limitations, and thereby protect himself from all but six years (*o*). An execution creditor is not entitled to the rent which accrues due after the delivery of the writ of elegit to the sheriff, but before the inquisition is taken (*p*). This action being for the recovery of damages, which are uncertain, the bankruptcy of the defendant cannot be pleaded in bar (*q*) ; and on the same principle a plea of discharge under an insolvent debtors' act is no bar (*r*). Nor is the pendency of a writ of error in parliament a bar in law to such an action (*s*).

A judgment, recovered in ejectment against the wife, cannot be given in evidence in an action against the husband and wife, for the mesne profits ; because the husband was no party to that suit (*t*). So a recovery in ejectment against a former tenant in possession is not producible in evidence, against a person who is afterwards found in possession, without proving that he came in under the defendant in ejectment, so as to make him a privy to the judgment in ejectment ; the rule of law being, that judgments bind only parties and privies, and as to strangers are considered as *res inter alios actæ* and consequently not producible against them (*u*). But where the judgment was against the casual ejector, the ejectment having been served on the tenant, it was held, that the judgment was admissible against the landlord, if he had notice of the ejectment, or subsequently promised to pay the rent and costs (*v*). And so *e converso* where the judgment in ejectment was against the lessor, and the action for mesne profits against the lessor, lessee [and under lessee ; it was held, that the judgment was admissible against the lessee, and that, it being proved that the lessee was in actual possession during the time for which mesne profits were claimed, through his under-lessees (from whom he had received rent, and whom he declared to be his tenants when possession was demanded by the plaintiff), the plaintiff was

(*k*) *Wilkinson v. Kirby*, 15 C. B. 430.

(*l*) *Decosta v. Atkins*, Bull. N. P. 87.

(*m*) *Doe v. Huddart*, 2 C. M. & R. 316.

(*n*) *Per Parke, B., Doe v. Seaton*, 2 C. M. & R. 732.

(*o*) Bull. N. P. 88.

(*p*) *Sharp v. Key*, 8 M. & W. 379.

(*q*) *Goodtitle v. North*, 2 Doug. 533.

(*r*) *Lloyd v. Peell*, 3 B. & Ald. 407.

(*s*) *Doe v. Wright*, 10 A. & E. 763.

(*t*) *Denn v. White*, 7 T. R. 112.

(*u*) *Doe v. Harvey*, 8 Bingh. 242.

(*v*) *Hunter v. Britts*, 3 Campb. 454.

entitled to retain the verdict he had obtained against the three defendants (x).

The plaintiff brought ejectment, and judgment for defendant, which was afterwards reversed on error. The plaintiff afterwards brought an action for mesne profits, and claimed to recover by way of damages the costs in error; it was held (y), that he was entitled to recover those costs as part of the damage sustained, on the ground, it seems, that the court of error could not award costs to the plaintiff, and that such costs could not otherwise have been recovered at all (z); but now by sect. 42 of the Common Law Procedure Act, 1854, the Court of Appeal, which by sect. 36 includes the court of error, has power to adjudge payment of costs, and to order restitution, &c. It was also held, that the jury might consider the costs *between attorney and client* as the measure of damage; and this is so, where there has been no taxation, but where there has, though at the instance of the defendant, the plaintiff is bound by it (a.)

(x) *Doe v. Harlow*, 12 A. & E. 40 (n.).

(y) *Nowell v. Roake*, 7 B. & C. 404.

(z) See *per Vaughan, B.*, in *Symonds*

v. Page, 1 C. & J. 34.

(a) *Doe v. Filliter*, 13 M. & W. 47.

CHAPTER XIX.

EXECUTORS AND ADMINISTRATORS.

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I. *Of Probate.*

By the 20 & 21 Vict. c. 77, ("the Court of Probate Act, 1857,") the testamentary jurisdiction of all ecclesiastical, peculiar, manorial and other courts, having authority to grant or revoke probate of wills or letters of administration, (and therewith the whole doctrine of *bona notabilia*,) is abolished (sect. 3); and the juris-

diction and authority of granting or revoking probate, &c. is vested in the Court of Probate established under that act, to which all the powers then vested in any court or person for those purposes are transferred (sect. 4). By sect. 23, such court shall have the same powers, and its grants and orders the same effect, in relation to the personal estate of deceased persons, as the Prerogative Court had within the province of Canterbury at the time of the passing of the act. And by sect. 25, the same power of enforcing its decrees, orders, &c. as the Court of Chancery.

"It is well established, that in the case of a British subject dying intestate in the colonies or in foreign countries, a prerogative administration extends to all the personal property of the intestate, wherever situate, at the time of his death, whether in Great Britain, or in the colonies, or in any country abroad" (a). There is, it is presumed, no distinction in this respect between probate and letters of administration. Assets in Ireland are to be considered as assets abroad. But by 20 & 21 Vict. c. 79, ss. 94, 95, Irish probates or letters of administration may be produced to the English Probate Court, and when sealed with the seal of the court, and stamped, have the same effect as a probate here; and so of English probates, &c. produced in Ireland to the court there. Administration was granted in Bengal to B. as attorney to A., a creditor in Bengal, and he received money under that. Afterwards C. obtained administration in England. A. sued B. for money had and received to his use; and it was held, that he was entitled to recover (b). So where a widow of an officer obtained administration in Bombay, and transmitted effects of the deceased obtained thereunder to her agent in England, and a creditor of the deceased afterwards took out administration in England and sued such agent for money in his hands, it was held, that the action would not lie at his suit, but only at that of the widow (c). If one take administration to a person who was *felo de se*, and receive effects under it, he shall be liable to creditors, though, by law, the effects belong to the king (d). An executor who after the testator's death is convicted of felony, is nevertheless entitled to probate (e).

By sect. 46 of the 20 & 21 Vict. c. 77, the district registrars appointed under the act may grant probate or administration in common form, *in the name of the Court of Probate*, on an affidavit, that the testator or intestate had a fixed place of abode within the district, such probate to have effect over the personal estate of the deceased in all parts of England; "and every probate and administration granted by any such district registrar shall effectually discharge and protect all persons paying to or dealing with any

(a) *Per Cur. Whyte v. Rose*, 3 Q. B. 507.

(b) *Farrington v. Clerk*, 3 Doug. 124.

(c) *Currie v. Bixham*, 1 D. & R. 35.

(d) *Megit v. Johnson*, 2 Doug. 542.

(e) *Smethurst v. Tomlin*, 30 L. J., Pr. & Mat. 269.

executor or administrator thereunder, notwithstanding the want of or defect in such affidavit, as is hereby required." Sect. 47.

By sect. 62, when probate of a will affecting real estate is granted in solemn form, or its validity declared by a decree in a contentious matter, the probate or decree shall enure for the benefit of all persons interested in the real estate affected by the will, and the probate copy of the will, or the letters of administration with the will annexed, or a copy thereof, stamped with the seal of the court, shall, in all courts, and in all suits relating to real estate, (except appeals under the act,) be received as conclusive evidence of the contents and validity of the will, in like manner as a probate is received in evidence in matters relating to personal estate. By sect. 64, where probate has not been granted in solemn form, or the validity of the will so established, the probate, or a copy, is to be sufficient evidence of the contents of the will and its validity, provided notice has been given to the other side, ten days at least before the trial, that it is intended to give it in evidence, and the party receiving such notice has not, within four days after such receipt, given notice that he disputes the validity of the devise. Sects. 64 and 62 are to be read together, and the construction of sect. 64 is, that where there has been a notice of the intention of one party to use the probate as a proof of a devise of real estate, and no counter notice within four days by the other side, the probate in common form shall have the force as a probate after proof in solemn form, that is, shall be *conclusive* evidence of the validity of the will (*f*). By sect. 64, the costs of producing and proving the original will in any such action are in the discretion of the judge at the trial.

After any grant of administration no person shall have power to prosecute any suit, &c. until such administration shall have been revoked; sect. 75; but in case of proceedings being commenced against a temporary administrator, and the administration being subsequently revoked, a suggestion may be made on the record of such revocation, and of the grant of probate, &c. consequent thereon, and the action may proceed against the new executor or administrator, subject to such conditions as the court may direct. Sect. 76.

By sect. 86, all grants of probates and administrations made before the commencement of the act, (25th August, 1857,) which may be void or voidable by reason only that the courts from which respectively the same were obtained had not jurisdiction to make such grants, shall be as valid as if the same had been obtained from courts entitled to make such grants.—This provision does not apply to grants, by courts having competent jurisdiction, to *the wrong person*. Such grants, however, "are not void, but only void-

(*f*) *Barraclough v. Greenhough*, 2 L. R. 1 Q. B.

able." "Where administration is granted in a wrong diocese, it is void: where to a wrong person, voidable" (g). So payment of money to an executor who has obtained probate under a forged will, is a discharge to the debtor, though the probate be afterwards declared void, for the law will never compel any person to pay a sum of money a second time, which he has once paid under the sanction of a court of competent jurisdiction (h). And the 20 & 21 Vict. c. 77, contains a similar provision (sect. 77) as to payments *bond fide* made to any executor or administrator under a probate or administration subsequently revoked under that act, which payments are to be "a legal discharge to any person making the same." A probate, as long as it remains unrepealed, cannot be impeached in the temporal courts (i).

II. *Of the Interest of an Executor or Administrator in the Estate of the Deceased.*

Executors or administrators so entirely represent the personal estate of the testator or intestate (k), that they are liable to the payment of all debts, covenants, &c., of the deceased, as far as the assets which have come to their hands will extend (l). The executors more actually represent the person of the testator, than the heir does the person of the ancestor; for if a man bind himself, his executors are bound though they are not named; but the heir is not bound, unless he be expressly named (m).

Before probate, and before any seizure, the law adjudges the property of the goods of the testator in the executors. Hence if any person take the goods of the testator before the executors have seized them, the executors shall have an action of trespass (2 Inst. 398) or replevin (n). So if a man die possessed of goods, and a stranger takes and converts them to his own use, and afterwards administration is granted to J. S.; J. S. may maintain trover for this conversion (o). Executors may release, or take a release before probate, if they prove afterwards (p). So executors may *commence* an action before probate, and it was sufficient, formerly, if at the time of declaring they produced in court the letters testamentary (q); and, profert not being now necessary in pleading (r), it would seem to be sufficient, if the probate be obtained before trial (s).

(g) *Per Holt, C. J., Blackborough v. Davis*, Salk. 38. *Per Weston, Baron, in Simpson v. Tresler*, Bull. N. P. 141.

(h) *Allen v. Dundas*, 3 T. R. 125. See *Pond v. Underwood*, Lord Raym. 1210, *post*, p. 693.

(i) *Allen v. Dundas*, 3 T. R. 125.

(k) 1 Inst. 208, b.

(l) See *per Parke, B., Siboni v. Kirkman*, 1 M. & W. 423.

(m) 1 Inst. 209, a.

(n) *By Walsh, J., and Dyer, C. J.,*

Plowd. 281, a.

(o) 2 Roll. Abr. 399, (A.) pl. 1.

(p) 1 Roll. Abr. 917, (A.) pl. 1;

Plowd. 281, a., S. P.

(q) 1 Roll. Abr. 917, (A.) pl. 2.

(r) 15 & 16 Vict. c. 76, s. 55.

(s) See *Wills v. Rich*, 2 Atk. 285, *per Lord Hardwicke, C. Acc. in equity, Humphreys v. Humphreys*, 3 P. Wms. 351; *Bateman v. Margerison*, 6 Hare, 504.

Each executor has the entire control of the personal estate of the testator, and may release or pay a debt, or transfer any part of the testator's property, without the concurrence of the other executor (*s*). If two have a lease for years as executors, and one sells the whole, this shall bind the other; and the whole shall pass; for each had the entire power of disposing of the whole, both being possessed in the right of the testator (*t*). So if one dispose of all the goods of the testator without the other (*u*). And it seems that the same rule holds with respect to administrators (*v*).

Although one of several executors may bind the others in the administration of the effects, he is not the agent of the others so as to bind them by his several contract (*x*).

Executors and administrators have a joint interest in the estate of the deceased. Hence, if there are two or more executors (*y*) or administrators (*z*), and one or more of them die, the administration of the estate of the deceased belongs to the survivor or survivors; and it seems, that an action may be brought by a surviving administrator without procuring a new grant of letters of administration (*a*). By s. 79 of the Probate Court Act of 1857, the rights of an executor renouncing are to cease as if he had not been named in the will, and by s. 13 of the Probate Act of 1858, an executor not acting or not appearing to a citation, is to be treated as if he had renounced.

As an executor is not entitled in his own right, but in *auter droit* (2 Inst. 236) to the property of the deceased, the goods of a

(*s*) *Per* Sir J. Strange, M. R., 2 Ves. sen. 267.

(*t*) *Pannell v. Fenn*, 1 Roll. Abr. 924, (O.) pl. 1; Gouldsb. 185, S. C.

(*u*) Dyer, 23, b., in marg.

(*v*) *Willand v. Fenn*, E. 11 Geo. II. B. R., MS. In that case a question arose, whether the release of one administrator would bind his companion? The case was argued in E. 11 Geo. II. when the court, entertaining doubts, directed a second argument. The second argument was heard Trin. 11 & 12 Geo. II., when Lee, C. J., expressed a strong opinion in favour of the affirmative, observing, that it was extremely difficult to form a distinction between executors and administrators upon any reasonable foundation; and that although it had not ever been determined at law, that the administration survived, yet having been so determined in equity, in *Adams v. Buckland*, 2 Vern. 514, cited 2 P. Wms. 121, n.; and by Lord Talbot, in the case of *Hudson v. Hudson*, Ca. Temp. Talbot, 127; he thought those authorities were so strong, that they ought not to be departed from. The

other judges were inclined to the same opinion, but as the case was new, and of general consequence, they ordered it to be argued again. According to Sir J. Strange, M. R., in *Jacomb v. Harwood*, 2 Ves. 267, the case was decided in the affirmative after the third argument; but from a MS. note in my possession, it appears to have been compromised before the third argument took place. In Mr. J. Gundry's MS. note, 13 Gendr. 33, a, it is said to have been adjudged for defendant; that is, that the release of one administrator did bind his companion. But see *Hudson v. Hudson*, 1 Atk. 460, West's Reports from Lord Hardwicke's MSS. p. 155, S. C.; and the observations of Sir J. Nichol, in *Warwick v. Greville*, 1 Phillim. 126; *Stanley v. Bernes*, 1 Hagg. Ecc. R. 222.

(*x*) *Turner v. Hardey*, 9 M. & W. 770.

(*y*) *Flanders v. Clarke*, 3 Atk. 510.

(*z*) *Hudson v. Hudson*, Ca. T. Talb. 127; *Adams v. Buckland*, 2 Vern. 514.

(*a*) *Per* Sir J. Strange, M. R., 2 Ves. 268, cites Rastall, 560, which was replevin by a surviving administrator, but no judgment.

testator, in the hands of his executor, cannot be seized in execution for the proper debt of the executor (b). So "if an executor become bankrupt, the commissioners cannot seize the *specific* effects of his testator." *Per* Lord Mansfield, C. J., 3 Burr. 1369. But where an executrix used the goods of her testator as her own, and afterwards married, and then treated the goods as the property of the husband, it was held that she could not object to their being taken in execution for the husband's debt (c). The mere use, however, of the intestate's goods in his house by his administrator for three months after the death of the intestate was, in a later case held, at Nisi Prius, by Lord Tenterden, C. J., not sufficient to authorize an execution against them for the administrator's own debts (d).

Formerly where testators, by their wills, appointed executors without making express disposition of the residue of their personal estate, the executors became by law entitled to the whole residue, and courts of equity to a certain extent followed the law; but now, by 1 Will. IV. c. 40, executors shall be deemed by courts of equity to be trustees for the persons entitled under the statute of distributions, in respect of the residue not expressly disposed of, unless it shall appear by the will or codicil, that the executor was to take the same beneficially. But by sect. 2, it is provided, that the executor's right shall not be affected where there is not any person entitled to the residue.

In an action of *indebitatus assumpsit*, brought by the plaintiff, as executor of J. S., deceased, for money due to the testator, but received by the defendant, after the testator's death, it appeared in evidence, that before the will was found administration had been granted, and that the administrator had made a warrant of attorney to the defendant to receive the money, which he had done accordingly, and had paid it over to the administrator without notice of the will. *Holt*, C. J., was of opinion, that although all acts done by an administrator, where there is a will, are void, and consequently in this case an action might have been maintained against the administrator, yet the defendant, having paid over the money without notice of the will, was not liable (e).

The property of a deceased person vests in the executor from the time of the death; in an administrator from the time of the

(b) *Farr v. Newman*, 4 T. R. 621.

(c) *Quick v. Staines*, 1 B. & P. 293. It is to be observed that this was a question between the executrix and one of her husband's creditors, and not between a creditor of the original testator pursuing the assets, and a creditor of the executrix, or of the husband of the executrix.

(d) *Gaskell v. Marshall*, 1 M. & Rob.

132.

(e) *Pond v. Underwood*, *Ld. Raym.* 1210. See *Allen v. Dundas*, *ante*, p. 691. *Trevor*, C. J., had ruled differently in *Jacob v. Allen*, *Salk.* 27: but in *Sadler v. Evans*, 4 Burr. 1986, Lord Mansfield, C. J., expressed his disapprobation of the decision in *Jacob v. Allen*, and recognised *Pond v. Underwood*.

grant of the letters of administration. Where, therefore, A. had obtained probate of a will, by which he was appointed executor, and after notice of a subsequent will, sold the goods of the testator: it was held, that the rightful executor, in an action of trover, was entitled to recover the full value of the goods sold, and that A. was not entitled, in mitigation of damages, to show that he had administered the assets to that amount (*f*). But the title of an administrator, though it does not exist until the grant of administration, relates back to the time of the death of the intestate; and he may recover against a wrong doer who has seized or converted the goods of the intestate after his death, but before the grant of administration, in an action of trespass (*g*), or trover (*h*); but detinue cannot be maintained by an administrator against a person who has had possession of the goods of the intestate, but has ceased to hold them prior to the grant of administration (*i*). In actions for trespass to chattels real, an entry must, it seems, have been made before action (*k*). An administrator may also obtain the benefit of a contract, intermediately made, by a person acting on behalf of the intestate's estate, and for its benefit (*l*), by suing on the contract (*m*); and may bring an action for money had and received against a stranger, who has paid over the money of the intestate in discharge of the intestate's debts and funeral expenses (*n*). So *e converso*, if one sanctions an expensive funeral, ordered by a relation of the deceased, and afterwards takes out administration, he is liable in the capacity of administrator, for the expenses (*o*). But it has been held, that where a landlord is entitled to a term of years, and dies without appointing an executor, a distress for rent made after his death and before administration granted, cannot be justified (*p*). An administrator may also bring ejectment (*q*).

In what Cases the Executor's Interest is transmissible.—The interest vested in B., the sole executor named in the will of A., is (if B. has proved the will (*r*)) transmissible to C., the executor of B.; that is, the executor of an executor having proved the will is the executor or personal representative of the first testator (*s*). By 25 Edw. III. stat. 5, c. 5—"Executors of executors shall have actions of debts, accounts, and of goods carried away of the first testators; and execution of the statutes merchants, and recog-

(*f*) *Woolley v. Clark*, 5 B. & Ald. 744. See *post*, p. 724.

(*g*) *Thorpe v. Stallwood*, 12 L. J., C. P. 241; 5 M. & G. 760, *S. C.*

(*h*) *Long v. Hebb*, Style, 341; 2 Roll. Abr. 399, tit. Relation (A.).

(*i*) *Crossfield v. Such*, 8 Exch. 825.

(*k*) *Barnett v. Earl of Guildford*, 11 Exch. 19.

(*l*) *Morgan v. Thomas*, 8 Exch. 302.

(*m*) *Foster v. Bates*, 12 M. & W. 226; *Bodger v. Arch*, 10 Exch. 333.

(*n*) *Welchman v. Sturgis*, 13 Q. B. 552.

(*o*) *Lucy v. Walrond*, 3 B. N. C. 841.

(*p*) *Keene v. Dee*, Alc. & Nap. 496, n. See Wms. on Exors. 559 (5th ed.) *in nota*.

(*q*) *Ante*, p. 621.

(*r*) *Hayton v. Wolfe*, Cro. Jac. 614.

(*s*) Bro. Abr. Administration, pl. 7.

nizances made in courts of record to first testator, *in the same manner as the first testator should have had if he were living*—and the executors of executors shall answer to others for as much as they have recovered of the goods of the first testators, as the first executors should do, if they were living.” This statute was, it seems, only in confirmation of the common law, except as to the action of account and trespass and to resolve doubts as to the action of debt (*t*). The executor of the *administrator* of A. is not the personal representative of A. (*u*); for the administrator of A. is merely the officer of the ordinary, in whom the deceased has not reposed any trust, and, therefore, on the death of such administrator, it results back to the ordinary to appoint another. Neither is the administrator of the executor of A., the personal representative of A. (*x*). In these cases, when the course of representation from executor to executor is interrupted by an intestacy, it becomes necessary that the ordinary (Court of Probate) should grant a new administration of the goods of the deceased, not administered by the former executor or administrator, as the case may be. Such administrator, usually termed an administrator *de bonis non*, is the legal personal representative of the deceased. The English executor of a foreign executor is not the representative of the original testator (*y*).

Where an Administration de bonis non is necessary.—An administration *de bonis non* is necessary:—1. Where the executor of the deceased, having proved the will, dies intestate. *Note.*—If an executor die *before* probate, although he should have administered part of the personal estate of the testator, an immediate administration, and not an administration *de bonis non*, must be granted (*z*). 2. Where there are several executors, and the surviving executor, having proved the will, dies intestate (*a*). 3. Where there are several executors, and all renounce except one, who proves the will and dies intestate (*b*). 4. Where an administrator dies before he has administered the whole personal estate of the deceased.

In assumpsit by an administrator *de bonis non* the promise was alleged in the declaration to have been made to J. H. the first administrator of the intestate, without stating any promise to the plaintiff. After verdict for the plaintiff, an exception was taken in arrest of judgment, that it was not sufficient to allege the promise made to the former administrator, between whom and the plaintiff there was not any privity; and that it ought to have appeared on the record, that the promise was made either to the intestate or to the plaintiff. But the court refused to grant a rule to show cause,

(*t*) *Chapman v. Dalton*, Plowd. 286, 290.

(*u*) *Ibid.*

(*x*) *Ley v. Anderton*, Sty. 225.

(*y*) *Twyford v. Trail*, 7 Sim. 92.

(*z*) *Per Holt*, C. J., in *Wankford v. Wankford*, Salk. 305.

(*a*) Bro. Abr. Executors, pl. 149.

(*b*) *Venables v. East India Company*, 2 Exch. 633; 20 & 21 Vict. c. 77, s. 79.

observing, that there was a privity of estate in law between the former administrator, from whom the plaintiff deduced his title, and the plaintiff (c).

By 17 Car. II. c. 8, made perpetual by 1 Jac. II. c. 17, s. 5—"Where any judgment after a verdict shall be had, by or in the name of any executor or administrator, in such case an administrator *de bonis non* may sue forth a *scire facias* and take execution upon such judgment."—It has been held to be within the equity of this statute, that an execution commenced by an administrator may be perfected by an administrator *de bonis non* (d). By the Common Law Procedure Act, 1852, s. 129, *et seq.*, a writ of revivor or a suggestion on the roll are in most cases substituted for the proceeding by *scire facias*.

The 23 & 24 Vict. c. 145, s. 30, enacts, that "it shall be lawful for any executors to pay any debts or claims upon any evidence that they may think sufficient, and to accept any composition or any security real or personal for any debts due to the deceased, and to allow any time for payment of any such debts as they shall think fit, and also to compromise, compound, or submit to arbitration all debts, accounts, claims, and things whatsoever relating to the estate of the deceased; and for any of the purposes aforesaid to enter into, give and execute such agreements, instruments of composition, releases, and other things, as they shall think expedient, without being responsible for any loss to be occasioned thereby."

III. Of limited or temporary Administrations.

1. *During the Minority of Executor.*—An infant, however young, may be an executor; but administration shall be granted to another during his minority. At the common law, such administration determined as soon as the infant executor attained the age of seventeen years, for then the infant was considered as capable of administering (e). But by 38 Geo. III. c. 87, s. 6—"Where an infant is sole executor, administration with the will annexed shall be granted to the guardian, &c., or to such other person as the (spiritual) court shall think fit, until such infant shall attain the age of twenty-one years, &c." A general administrator, *ratione minoris ætatis*, shall not only have an action to recover debts and duties, and be liable to all actions, &c., but may also grant leases (f), provided it be not to the prejudice of the infant (g). An administrator, *durante minore ætate* of an administrator, may act and sue until the administrator be of the age of twenty-one years (h). If

(c) *Hirst v. Smith*, 7 T. R. 182.

(d) *Clerk v. Withers*, Salk. 323. See Wms. on Exors. 427 (5th ed.).

(e) *Prince's case*, 5 Rep. 29, b.

(f) 6 Rep. 67, b.

(g) Bac. Abr. Executors (B. 1), 2.

(h) *Freke v. Thomas*, Salk. 39.

an administrator *durante minore ætate* bring an action, he must aver in the declaration that the infant is still under age (*i*); though no such averment is necessary in an action *against* such administrator (*k*). But if the defendant do not take advantage of the omission by plea or demurrer, he cannot object to it after joining issue on another point, which admits the continuance of the authority (*l*).

2. *During the Absence of Executor beyond Sea.*—When the executor, or next of kin, is out of the realm, administration may be granted during his absence; for the debt due to the intestate might be lost, if such an administration could not be granted (*m*). Such limited administration is grantable at common law *before* probate has been obtained, or letters of administration granted to the absent executor or next of kin, but not *after*. To remedy this, by 38 Geo. III. c. 87, s. 1—If at the expiration of twelve calendar months after the death of the testator, the executor, (extended to administration by sect. 74 of Probate Act, 1857,) to whom probate has been granted, is residing out of the jurisdiction of the king's courts, the [Ecclesiastical] court, which has granted the probate, may, upon the application of any creditor, next of kin, or legatee, on affidavit, grant a special administration to such creditor, &c., for the purpose of being made a party to a bill in equity, to be exhibited against him and to carry the decree into effect, and no further, or otherwise. And by the 18th section of Probate Act, 1857, these provisions are extended to all executors and administrators residing out of the jurisdiction, whether it be or be not intended to institute proceedings in the Court of Chancery. By sect. 4, of the Act of Geo. III., the court of equity, in which the suit shall be depending, may appoint any person to collect the debts due to the estate, and give discharges.

In an action by a person to whom such administration is granted, the absence of the executor in parts beyond the seas ought to be averred in the declaration (*n*). The plaintiff, having taken out letters of administration under the preceding statute, and having been appointed by the Court of Chancery, under sect. 4, to collect the debts of the deceased, brought an action to recover a debt due to the testator; the defendant pleaded, that on a day prior to the commencement of the action, the executor, to whom probate of the will had been granted, died. On demurrer, the plea was held bad by *Rooke and Chambre, Js.* (*Alvanley, C. J., diss.*), on the ground, that the authority of the special administration continued until the appointment of a new representative, notwithstanding the death of

(*i*) *Pigott's case*, 5 Rep. 29.

(*k*) *Walthall v. Aldrich*, Cro. Jac. 590.

(*l*) Bac. Abr. Executors (B. 1), 2;
Beale v. Simpson, Ld. Raym. 408.

(*m*) *Clare v. Hedges*, cited 2 P. Wms. 580.

(*n*) *Slater v. May*, 2 Ld. Raym. 1071.

the executor (*o*). However, where a common law administration has been granted to one as the attorney, and for the benefit of the absent executor named in a will, he, and not the executor, is the legal representative of the testator, and he continues to be so during the life of the executor, or, at all events, until he himself takes out probate; but the grant ceases *ipso facto* on the death of the executor (*p*). An administration *durante absentia*, granted at common law, is at an end the moment the executor, or next of kin, returns (*q*). But if in such a case a debtor of the deceased has paid the temporary administrator, without notice of the return of the executor or next of kin, such payment is good (*r*). Declarations made by the executor, previous to the proceedings for the appointment of a temporary administrator under the act, are not evidence against such administrator in an action brought by him; but the *acts* of the executor are (*s*).

3. *Pendente Lite, or Pending Litigation*.—When a suit is commenced in the Ecclesiastical (Probate) Court touching the validity of a will, or right of administration, an administration may be granted pending the suit, and the person to whom it is granted may bring actions to recover debts due to the deceased, averring that the suit is still depending (*t*), or he may bring ejectment (*u*); and such administrator may be sued, inasmuch as he is for the time complete administrator (*x*).

4. *During Lunacy*.—Where a sole executor, or next of kin, happens to be a lunatic at the time of the testator's or intestate's decease, the practice is to make a limited grant of administration to his committee, if he has been found a lunatic by inquisition (*y*); if not, to a residuary legatee in the case of a will (*z*), or to the next of kin of the person entitled to administration in the case of intestacy (*a*). In a case where a widow administratrix became lunatic, the court declined to revoke the administration, but granted administration to the son of the deceased, the letters granted to the widow being first brought into and impounded in the registry, in order to be re-delivered out in case of her recovery (*b*). In a case where one of two executors became lunatic, the court granted a fresh probate, (the former probate having been brought in,) with power reserved of making a like grant to the lunatic, when he should become of a sound mind and apply (*c*).

(*o*) *Taynton v. Hannay*, 3 B. & P. 26.

(*p*) *Suwerkrop v. Day*, 8 A. & E. 624.

(*q*) Wms. on Exors. 444 (5th ed.).

(*r*) *Clare v. Hedges*, cited 2 P. Wms. 580.

(*s*) *Rush v. Peacock*, 2 M. & Rob. 162.

(*t*) *Woolaston v. Walker*, Str. 917.

(*u*) *Wills v. Rich*, 2 Atk. 285.

(*x*) *Impe v. Pitt*, 2 Show. 69.

(*y*) *In the goods of Phillips*, 2 Add. 336, n. (*b*).

(*z*) *In the goods of Milnes*, 3 Add. 55.

(*a*) *Exp. Evelyn*, 2 M. & K. 3.

(*b*) *In the goods of Binckes*, 1 Curt. 286; and see 1 Cas. Temp. Lee, 625.

(*c*) *In the goods of Marshall*, 1 Curt. 297.

IV. *Of an Executor de son Tort:*

An executor *de son tort* is a person who, without any authority derived from the deceased or ordinary (Court of Probate), does such acts as belong to the office of an executor or administrator. As to the acts which will render a person liable as executor *de son tort*, it will be observed:—

1st. In the case of intestacy, if a stranger takes the goods of the intestate, and uses or sells them, this will make such stranger an executor *de son tort* (*d*); although it be done by the order of the intestate himself (*e*). But a person who knowingly receives a chattel from an executor *de son tort*, and deals with it as his own, does not thereby become such executor (*f*). 2ndly. In the case of a will, and a regular appointment of an executor, who proves the will; if a stranger takes the goods, and, *claiming to be executor*, pays debts, &c., and intermeddles, *as executor*, he may, for such express administration as executor, be charged as an executor *de son tort*, although there is another executor of right (*g*). But, if, after the executor has proved the will, and administered, a stranger takes any of the goods, and, *claiming them as his own*, uses and disposes of them accordingly, this will not make him in construction of law an executor *de son tort*; because there is a rightful executor, who may be charged with these goods so taken from his possession, as assets, and to whom the stranger will be answerable in trespass for taking the goods. 3rdly. In the case of a will, if a stranger takes the goods *before* the rightful executor has proved the will or taken upon him the execution thereof, the stranger may be charged as an executor *de son tort*; for the rightful executor shall not be charged with any goods except those which came to his hands after he had taken upon him the charge of the will (*h*).

The slightest acts have been deemed sufficient to constitute an executor *de son tort*; as where a widow milked her late husband's cows, or took a dog (*i*). But locking up the goods of the intestate for preservation, making an inventory of his property, feeding his cattle, &c., are not sufficient, for these are offices merely of kindness or charity (*k*). So living in the house and carrying on the trade of the deceased, a victualler, was held sufficient (*l*). But where the trade was one depending on personal skill, as that of a hair-dresser, and though the shop was kept open, it was shown that the entry to the house lay through it, and no evidence was given

(*d*) *Read's case*, 5 Rep. 33, b.

(*e*) *Padget v. Priest*, 2 T. R. 97.

(*f*) *Paull v. Simpson*, 9 Q. B. 365.

(*g*) This was denied by Lord *Kenyon*, in *Hall v. Elliott*, Peake's N. P. C. 87, and by Sir *T. Plumer*, in *Tomlin v. Beck*, T. & R. 438; those judges maintaining that there cannot be a rightful executor

and an executor *de son tort* at the same time. But see *Cottle v. Aldrich*, 4 M. & S. 175, *post*, p. 700.

(*h*) *Read's case*, 5 Rep. 34, a.

(*i*) *Dyer*, 166, b., in marg.

(*k*) *Wms. on Exors.* 230 (5th ed.).

(*l*) *Hooper v. Summerset*, Wightw. 16

of any articles being sold; it was held, that the widow of the hairdresser was not executrix *de son tort* (*m*). If a creditor takes an absolute bill of sale of the goods of his debtor, but agrees to leave them in his possession for a limited time, and in the meantime the debtor dies, whereupon the creditor sells the goods, he thereby becomes an executor *de son tort* (*n*).

Where a party receives a debt due to the estate of a person deceased for the purpose of providing the funeral, he will not thereby become chargeable as executor *de son tort*, unless he receive a greater sum than is reasonable for that purpose, regard being had to the estate and condition of the deceased, which is a question for the jury (*o*). But a single act of wrong in taking the goods of the intestate, though it may be sufficient to make the party an executor *de son tort*, with respect to creditors who may choose to sue him in that character, yet will not give him any right to retain them as against the lawful administrator. In trover for a quantity of iron, it appeared that the goods in question had been originally sold by the defendant to the intestate; that on his death, they not having been paid for, the intestate's widow delivered them back to the defendant in satisfaction of his demand. No other acts were stated to have been done by the widow, to show that she had before taken upon herself to act as executrix. It was held, that the plaintiff, as rightful administrator, was entitled to recover the value of the goods (*p*). Where, however, the executor *de son tort* is really acting as executor, and the party with whom he deals has fair reason for supposing that he has authority to act as such (which is a question for the jury), his acts (done in due course of administration (*q*)) will bind the rightful executor (*r*). So where a debtor of the deceased handed over money and securities to a *feme covert* executrix, whose husband subsequently dissented from her acting; it was held, that the debtor was discharged as against the co-executor (*s*).

A. pledged goods to B. for a debt; B. died, and the parish officers took the goods, and gave them to J., the carpenter, who made B.'s coffin, on condition of his paying B.'s rent and the funeral expenses; it was held, that, by taking these goods, the parish officers became executors *de son tort*; and that, if they sold the goods to J., they would be liable to A. in trover, because such a sale was so inconsistent with the bailment, as to revest the right of possession in A. (*t*). A person who possesses himself of

(*m*) *Serle v. Waterworth*, 4 M. & W. 9. The jury are to determine whether the acts are sufficiently proved; but the question, whether executor *de son tort*, or not, is a conclusion of law. 2 T. R. 99.

(*n*) *Edwards v. Harben*, 2 T. R. 587.

(*o*) *Camden v. Fletcher*, 4 M. & W. 378.

(*p*) *Mountford v. Gibson*, 4 East, 441.

(*q*) *Buckley v. Barber*, 6 Exch. 164.

(*r*) *Thomson v. Harding*, 2 E. & B. 630.

(*s*) *Pemberton v. Chapman*, 27 L. J., Q. B. 429 (*in error*), *diss. Bramwell*, B., and *Cockburn*, C. J.

(*t*) *Samuel v. Morris*, 6 C. & P. 620.

the effects of the deceased, under the authority, and as agent for, the rightful executor, cannot be charged as an executor *de son tort* (u). But as soon as the principal in such a case dies, the agent, if he continues to act, although by the advice of another executor who has not proved, is liable (x). A person who sets up in himself a colourable title to the goods of the deceased, e. g. a lien, though he may not be able to make out his title completely, is not liable as executor *de son tort* (y).

The plaintiff having received a horse belonging to the intestate from the defendant in remuneration of services performed at the request of the defendant about the funeral of the intestate, afterwards administered to the estate, and brought trover against the defendant for the value of the horse, so received by himself before he became administrator. It was held by *Dolben and Eyre, JJ.*, that the plaintiff, being a *particeps criminis* in the very act he complained of, should not be permitted to recover upon it against the person with whom he had colluded. But *Holt, C. J.*, was of a different opinion, conceiving that in this case, if a stranger, or third person, had taken out letters of administration, an action might have been maintained against the defendant by such an administrator for the recovery of the horse; and here the plaintiff was a third person; *for being administrator, he sued, and should recover*, in the right of the intestate (z). An act done by a person as executor *de son tort* will not bind him after he becomes rightful administrator (a). The general principle is, that the administration has relation back only in those cases where the act to be ratified is for the protection and benefit of the estate (b). An executor *de son tort* must be declared against as a rightful executor (c). See further on the subject of executor *de son tort*, *post*, "*Of the Right of Retainer.*"

V. Of the Disposition of the Estate of the Deceased.

The order of payment, which ought to be observed by executors and administrators in the disposition of the estate of the deceased, is as follows :—

1. Funeral charges, and expenses of probate, or taking out letters of administration (d).—An executor who gives no order for the funeral, is liable only to the extent of the expenses suitable to

(u) *Hall v. Elliott*, Peake's N. P. C. 86.

(x) *Cottle v. Aldrich*, 4 M. & S. 175.

(y) *Flemings v. Jarrat*, 1 Esp. 336.

(z) *Whitehall v. Squire*, Carth. 103; see *Mountford v. Gibson*, 4 East, 445; 3 B. N. C. 841.

(a) *Doe v. Glenn*, 1 A. & E. 49; *Mid-*

dleton's case, 5 Rep. 28, b. See *Lucy v. Walrond*, ante, p. 694.

(b) *Morgan v. Thomas*, 8 Exch. 305; see *Hill v. Curtis*, 35 L. J., Ch. 133.

(c) *Alexander v. Lane*, Yelv. 137.

(d) 1 Roll. Abr. 926, (S.) pl. 1; Dr. & Stud. Dial. 2, c. 10.

the rank and circumstances of the testator, unless he, as an individual, and not in his character of executor, ratifies the orders given, in which case he is liable for the whole expense (*e*). Whether the funeral is ordered by the executor or another person, the estate must pay the reasonable expenses, and can in no event be liable beyond them (*f*). But if there are assets, the allowance shall be according to the estate and degree of the deceased. The testator having desired to be buried at a church thirty miles distant, and it not being clear that there would be a deficiency, Lord *Hardwicke*, Ch., allowed 60*l.* for funeral expenses (*g*). So in another case (*h*), 600*l.* were allowed, in respect of the testator's quality, and his having been buried in his own country.

Lord *Holt* said, that *as against a creditor* no funeral expenses are in the case of an insolvent estate in strictness allowed, except for the coffin, ringing the bell, the parson, clerk, and bearers' fee; but not for the pall or ornaments (*i*). At first 40*s.*, then 5*l.*, and afterwards 10*l.* was allowed (*k*). Mr. Justice *Bayley* said, that as against a creditor, the rule of law is, that no more shall be allowed for funeral expenses than is necessary; and in considering what is necessary, regard must be had to the degree and condition in life of the party (*l*).

2. Debts due to the king, by record or specialty.—Fines and amerciaments, in the king's courts of record, are debts of record. Went. Off. Exor. ch. 12. By 33 Hen. VIII. c. 39, s. 50, it is enacted, that all obligations and specialties for any cause concerning the King shall be taken *domino regi*, and shall be of the same force and effect as a statute staple. By the 55 Geo. III. c. 184, s. 45, the Commissioners of Stamps may give credit for the duties on probate, &c.; and by sect. 48, the duty for which credit is so given shall be a debt to the Crown, and be paid in preference to any other debt whatsoever.

3. Debts due by certain statutes, *e. g.* to the post-office, not exceeding 5*l.* (*m*); from an overseer of the poor; 17 Geo. II. c. 38, s. 3; by which act executors of an overseer are directed to pay, out of his assets, all monies due received by virtue of his office "before any of his other debts are paid and satisfied" (*n*). A similar provision is contained in 18 & 19 Vict. c. 63, s. 23 (*o*), respecting executors of persons intrusted with the monies or effects of friendly

(*e*) *Brice v. Wilson*, 8 A. & E. 349, n.

(*f*) *Green v. Salmon*, 8 A. & E. 348.
See also *Lucy v. Walrond*, 3 B. N. C. 841, ante, p. 694.

(*g*) *Stag v. Punter*, 3 Atk. 119.

(*h*) *Offley v. Offley*, Prec. Ch. 26.

(*i*) *Shelley's case*, Salk. 296.

(*k*) See *Smith v. Davis*, Midd. Sitt. after Mich. Term 10 Geo. II. MS. See also Bull. N. P. 143.

(*l*) *Hancock v. Podmore*, 1 B. & Ad. 260, in which case 79*l.* was held to be too large a sum as against a creditor for the funeral expenses of a captain in the army on half-pay. See *Edwards v. Edwards*, 2 Cr. & M. 612.

(*m*) 9 Ann. c. 10. s. 30.

(*n*) See Wms. on Exors. 897 (5th ed.).

(*o*) A re-enactment in substance of 4 & 5 Will. 4, c. 40, s. 12.

societies; and by 3 & 4 Will. IV. c. 14, s. 28, respecting executors of officers of savings banks. By 58 Geo. III. c. 73, s. 1, the regimental debts of officers and soldiers dying in actual service are to be paid in preference to any other debts whatsoever.

4. Debts by judgments in the Court of King's Bench, Common Pleas, and Exchequer; by judgments in other courts of record; by decrees in courts of equity (*p*); according to their respective priorities. By 1 & 2 Vict. c. 110, s. 18—All decrees and orders of courts of equity, and all rules of courts of common law, and all orders of the Lord Chancellor, or Court of Review in bankruptcy, or of the Lord Chancellor in lunacy, whereby any sum of money or any costs, &c., are payable to any person, have effect as judgments of the superior courts of common law. An order of a court of equity for the payment of money into the Bank, in the name of the Accountant-General, to the credit of a cause, is not an order within this section (*q*). But a judge's order (under 6 & 7 Vict. c. 73, s. 43), on the taxation of an attorney's bill, ordering judgment to be entered up for the amount found by the master's allocatur, has the same effect as a rule of court under this section (*r*).

At common law, executors and administrators were bound at their peril to take consuance of debts of the testator upon record. Hence, to an action on a judgment recovered against the testator or intestate, executors or administrators could not plead, that they had exhausted the assets in payment of debts of an inferior nature without notice of the judgment (*s*). To obviate the mischiefs to which personal representatives were liable, from the difficulty of finding such judgments, the 4 & 5 W. & M. c. 20 (made perpetual by 7 & 8 Will. III. c. 36, s. 3), directed, that the proper officers of the Courts of Common Pleas, King's Bench, and Exchequer, should make a doggett of all judgments (sect. 2), and that no judgments not doggetted should have any preference against executors and administrators in the administration of their testator's or intestate's estates (sect. 3). The construction put on this section was, that the judgments not doggetted were thereby placed on a level with simple contract debts (*t*). Hence, to an action on a simple contract debt of a testator or intestate, the personal representative could not plead an outstanding judgment recovered against the testator or intestate, if it had not been doggetted under the above statute (*u*). But now, by 2 & 3 Vict. c. 11, s. 1, no judgment shall hereafter be docketed under the provisions of the foregoing statute; and by sect. 2, no judgment already docketed shall, after the 1st Aug. 1841, affect any lands, tenements, or *hereditaments*, as to purchasers,

(*p*) *Searle v. Lane*, 2 Vern. 88; *Bishop v. Godfrey*, Prec. in Chanc. 179 (Finch's ed.); 1 & 2 Vict. c. 110, s. 18.

(*q*) *Gibbs v. Pike*, 8 M. & W. 223.

(*r*) *Griffiths v. Hughes*, 16 M. & W. 809.

(*s*) *Littleton v. Hibbins*, Cro. Eliz. 793.

(*t*) *Hickey v. Hayter*, 6 T. R. 384.

(*u*) *Steel v. Rorke*, 1 B. & P. 307, cited in *Hall v. Tapper*, 3 B. & Ad. 655.

mortgagees, or creditors, until such a memorandum thereof as is prescribed by 1 & 2 Vict. c. 110, s. 19, shall be left with the senior Master of the Court of Common Pleas, who shall forthwith enter the same, &c. By sect. 4, all judgments of any of the superior courts, decrees or orders in any court of equity, rules of a court of common law, and orders in bankruptcy, or lunacy, registered under the 1 & 2 Vict. c. 110, shall be void after five years from entry, unless a like memorandum is left with the senior Master, who shall re-enter, and so, *toties quoties*, at the expiration of every five years. See also 3 & 4 Vict. c. 82, s. 2.

If a judgment be satisfied, or only kept on foot to injure other creditors, or if there be any defeasance of the judgment then in force, then the judgment will not avail to keep off other creditors from their debts. Went. Off. Exor. c. 12. Between one judgment and another, precedency or priority of time is not material, but he who first *sueth* the executor must be preferred; and before execution sued, it is at the election of the executor to pay whom he will first. Went. Off. Exor. c. 12.

5. Recognizances at common law; statutes merchant and staple (*x*); and recognizances in the nature of statute staple, pursuant to 23 Hen. VIII. c. 6 (*y*). This must be understood of recognizances and statutes *forfeited*, where the recognizances are for keeping the peace, good behaviour, &c., and the statutes are for performing covenants, &c. A recognizance not enrolled was considered (*z*) as a bond, (the sealing and acknowledging of the recognizance supplying the want of delivery,) and to be paid as a specialty debt. A recognizance, in its proper sense, is nothing more than a debt of record to the crown, defeasible in a particular event (*a*).

6. Arrears of rent due at the death of the testator or intestate, either on a parol lease or lease by deed; debts by specialty, as bonds; damages upon covenants broken (*b*), &c.

Arrears of rent on a parol lease, which is determined, are in equal degree with a bond debt; because the contract remains in the realty, though the term be determined (*c*). A debt due for rent reserved upon a demise by deed, or by parol (*d*), is in equal degree with a bond debt (*e*).

A bond with a penalty conditioned for the payment of a less sum of money, on a day not arrived at the death of testator, may

(*x*) 4 Rep. 59, b.; 1 Roll. Abr. 925.

(*y*) These securities are obsolete. See Wms. on Exors. 906 (5th ed.).

(*z*) *Bothomly v. Fairfax*, 1 P. Wms. 334.

(*a*) *Rex v. Mayor of Dover*, 1 C. M. & R. 726.

(*b*) The lien of a solicitor in a cause

takes precedence of specialty debts in certain cases. *Turwin v. Gibson*, 3 Atk. 720.

(*c*) *Newport v. Godfrey*, 3 Lev. 267.

(*d*) *Brown v. Holyoak*, Barn. 290.

(*e*) *Gage v. Acton*, Carth. 511; cited by *Denman*, C. J., and *Littledale*, J., in *Davis v. Gyde*, 2 A. & E. 626.

be pleaded by his executor as a specialty debt (*f*), as well as a forfeited bond; but there is this distinction between them,—that in the case of a bond forfeited, the penalty is the legal debt, and assets may be covered to that amount; but in the case of a bond not forfeited, as the executor by discharging it may save the penalty, the assets can be covered only to the amount of the sum mentioned in the condition (*g*). Where there are several debts by specialty, all due and payable at the death of the testator, if suit is not commenced by any of the creditors, and notice thereof given to the executor, he may give the preference to whom he pleases: and if he be a creditor himself, he may pay himself first. Went. Off. Exor. c. 12.

With respect to contingent securities,—such as bonds to save harmless, for the performance of covenants, &c.—before any breach of condition, they shall not stand in the way of debts of an inferior degree (*h*). And if, subsequently to the payment of the simple contract debt, the contingency should happen, and the bond be put in suit, it will be a good defence for the executor, that he has paid the simple contract debt, and has no more assets wherewith to satisfy the bond (*i*). Any voluntary bond is good against an executor or administrator, unless some creditor be thereby deprived of his debt. Indeed, if the bond be merely voluntary, a real debt, though by simple contract only, shall have the preference; but if there be not any debt, then a bond, however voluntary, must be paid by an executor. Voluntary bonds given to be paid after death take the place of legacies, but not of debts by simple contract (*k*). A voluntary bond is postponed in equity to debts by simple contract (*l*).

Covenants running with the land are binding on the executors, although not expressly named (*m*).

By 22 & 23 Vict. c. 35, s. 27, where an executor or administrator, liable as such to the rents, covenants, or agreements contained in any lease or agreement for a lease granted or assigned to the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said lease or agreement for a lease as may have accrued due and been claimed up to the time of the assignment hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the lessee to be laid out on the property demised or agreed to be demised, although the period for laying out the same may not have arrived, and shall have assigned the lease or agree-

(*f*) *Lemun v. Fooke*, 3 Lev. 57.

(*g*) *Bank of England v. Morice*, 2 Str. 1028.

(*h*) *Hawkins v. Day*, Ambl. 160.

(*i*) *Collins v. Crouch*, 13 Q. B. 542.

(*k*) *Per* Ld. Ch. *Harcourt, Powell v.*

Wood, MS. Cases in Chancery, p. 84, Lincoln's Inn Library, Bookcase A.

(*l*) Cases Temp. Hardwicke, by West, p. 240.

(*m*) See Went. Off. of Exors. p. 178, edit. 1763.

ment for a lease to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part, or any further part, (as the case may be,) of the personal estate of the deceased to meet any future liability under the said lease or agreement for a lease; and the executor or administrator so distributing the residuary estate shall not, after having assigned the said lease or agreement for a lease, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said lease or agreement for a lease; but nothing herein contained shall prejudice the right of the lessor or those claiming under him to follow the assets of the deceased into the hands of the person or persons to or amongst whom the said assets may have been distributed.

By sect. 28, in like manner, where an executor or administrator liable as such to the rent, covenants, or agreements contained in any conveyance on chief rent or rent-charge (whether any such rent be by limitation of use, grant, or reservation,) or agreement for such conveyance, granted or assigned to or made and entered into with the testator or intestate whose estate is being administered, shall have satisfied all such liabilities under the said conveyance, or agreement for a conveyance, as may have accrued due and been claimed up to the time of the conveyance hereafter mentioned, and shall have set apart a sufficient fund to answer any future claim that may be made in respect of any fixed and ascertained sum covenanted or agreed by the grantee to be laid out on the property conveyed, or agreed to be conveyed, although the period for laying out the same may not have arrived, and shall have conveyed such property, or assigned the said agreement for such conveyance as aforesaid, to a purchaser thereof, he shall be at liberty to distribute the residuary personal estate of the deceased to and amongst the parties entitled thereto respectively, without appropriating any part or any further part (as the case may be) of the personal estate of the deceased to meet any future liability under the said conveyance or agreement for a conveyance; and the executor or administrator so distributing the residuary estate shall not, after having made or executed such conveyance or assignment, and having, where necessary, set apart such sufficient fund as aforesaid, be personally liable in respect of any subsequent claim under the said conveyance, or agreement for conveyance; but nothing herein contained shall prejudice the right of the grantor, or those claiming under him, to follow the assets of the deceased into the hands of the person or persons to or among whom the said assets may have been distributed.

7. Debts by simple contract, as bills of exchange, promissory notes, &c. (n); of which those due to the king shall, it seems, be

(n) *Yeomans v. Bradshaw*, Carth. 373.

satisfied before those due to subjects (*o*). A breach of trust is considered but as a simple contract debt (*p*); and the damages recovered in an action against an executor, under 3 & 4 Will. IV. c. 42, s. 2, for the injury by the deceased to the real or personal property of another, are by that statute directed to be paid in the same order as simple contract debts.

8. Damages for dilapidations, payable by the executors, &c., of an incumbent, are to be postponed to the debts of the deceased of every description (*q*).

9. Legacies, &c.—Formerly, if an executor paid away a residue he did it at his own risk, and he was held personally liable (to the extent of the assets received) to the payment of debts, even although he had no notice at the time of distribution (*r*); but now, after having given a notice to send in claims, similar to what is given by the Court of Chancery in an administration suit, an executor may, at the expiration of the time named in the notice, distribute the assets without being liable for debts of which he had no notice (*s*).

VI. Admission of Assets.

While an executor is passive, he is chargeable only in respect of the assets; but if he promises to pay a debt of the testator at a future day, he thereby makes it his own debt, and it shall be satisfied by his own goods (*t*).

All separate debts, mentioned in the inventory, shall be deemed assets in the executor's hands; but the executor may discharge himself by showing the demand and refusal of them (*u*). In the inventory, which the defendant had exhibited, were inserted several debts due and outstanding, which defendant charged herself with when received or recovered; Lord *Hardwicke*, C. J., put the defendant on proof, that she could not recover those debts; for she ought in her inventory to have set forth which debts were sperate and which desperate. The defendant proved by a witness, who went to demand several of them, that he could not recover them; and accordingly they were allowed as desperate (*x*). But Lord *Ellenborough*, C. J., held, that some proof, presumptively at least, must be given that debts not mentioned in the inventory

(*o*) 3 Bac. Abr. 80, (L.) 2.

(*p*) *Vernon v. Vawdry*, 2 Atk. 119.

(*q*) *Bryan v. Clay*, 1 E. & B. 38.

(*r*) *Smith v. Day*, 2 M. & W. 684. Acc. in equity, unless the executor has passed his accounts in Court. *Knatchbull v. Fearnhead*, 3 M. & Cr. 122; *Hill v. Gomme*, 1 Beav. 540; *Newcastle Banking Co. v. Hymers*, 22 Beav. 367.

(*s*) 22 & 23 Vict. c. 35, s. 29.

(*t*) *Per Yelverton, J.*, in *Goring v. Goring*, Yelv. 11.

(*u*) *Shelley's case*, per *Holt*, C. J., Salk. 296.

(*x*) *Smith v. Davis*, Midd. Sitt. after M. T. 10 Geo. II., MS., recognized in *Young v. Cawdrey*, 8 Taunt. 734.

as desperate had been paid, and said, that on the issue of *plene administravit* that was the universal practice (y). The amount of the probate stamp is not, it seems, even *prima facie* evidence of the receipt of assets to that extent (z). "I cannot see how a man's saying that assets *will* come to his hands is evidence, that assets *have* come to his hands" (a). The stamp is, however, admissible in evidence.

A judgment by default against an executor is an admission of assets to satisfy the demand; and if a *fi. fa.* be sued out on such judgment, and the sheriff cannot find goods of the testator sufficient to answer the demand, the sheriff may return a *devastavit* (b). So a judgment for the plaintiff after verdict, on a plea by the executor of *non est factum*, is an admission of assets (c). So where an administrator being sued in a manor court pleaded "no assets," upon which issue was taken, and there was judgment for the plaintiff. Execution was then issued, and *nulla bona* returned. The plaintiff then declared, in a superior court, in debt, setting forth the above proceedings, and alleging that the defendant had assets, but had eligned and wasted them. The defendant pleaded that he had fully administered, and had not wasted, &c., upon which issue was taken. It was held, that the defendant could not, on the trial of this issue, prove that all assets which had come to his hands at the time of the former recovery had been duly administered, and that the plaintiff might take the objection, without having replied the former recovery as an estoppel (d). "If an executor will not take advantage by pleading, but suffers judgment to go by default, such judgment is an admission of assets, and is as strong against an executor, as if assets were found by verdict on a *plene administravit*" (e). On the authority of the preceding cases it was held, that, where an executor had pleaded payment to an action of debt on bond, which plea was found against him, and judgment accordingly, it operated as an admission of assets; and a writ of *fi. fa.* having been sued out on the judgment, to which the sheriff had returned a *devastavit*, and an action having been brought against the executor on the judgment suggesting a *devastavit*; it was held, that the production of the record of the judgment, the writ of *fi. fa.* and the sheriff's return, was sufficient evidence to support the action (f).

If an executor pay interest on a bond due from his testator, it will not conclude him from alleging want of assets to pay the principal, but it relieves the creditor from the necessity of proving

(y) *Gyles v. Dyson*, 1 Sta. N. P. C. 32. Acc. per Lord Denman, C. J., in *Stearn v. Mills*, 4 B. & Ad. 657.

(z) *Mann v. Lang*, 3 A. & E. 699.

(a) *Per Patteson, J., S. C.*

(b) *Rock v. Leighton*, cited 3. T. R.

690.

(c) *Ramsden v. Jackson*, 1 Atk. 292.

(d) *Darson v. Gregory*, 7 Q. B. 756.

(e) *Per Lee, C. J., Skelton v. Hawling*, MS.; 1 Wms. Saund. 219, d., S. C.

(f) *Erving v. Peters*, 3 T. R. 685.

assets, and throws the onus on the other side (*g*). Where a defendant binds himself as administrator to abide by an award touching matters in dispute between his intestate and another, and the arbitrator awards, that the defendant as administrator shall pay a certain sum, it operates as an admission of assets between those parties, and the defendant cannot plead *plene administravit* to an action of debt on the bond; because the giving such bond is an undertaking to pay whatever the arbitrator may award (*h*). And in such case, if an attachment be moved for against the administrator for the non-payment of the money awarded, he cannot defend himself against it, by suggesting a deficiency of assets; for a submission to arbitration by a personal representative is considered as a reference, not only of the cause of action, but also of the question, whether or not he has assets. And when the arbitrator awards that the personal representative do pay the amount of the plaintiff's demand, it is equivalent to determining as between those parties, that the personal representative had assets to pay the debt (*i*). But a mere submission to arbitration is not of itself an admission of assets; for in a case where the arbitrator only ascertained the amount of the demand, without ordering the administrator to pay it, it was held, that the administrator might plead *plene administravit* (*k*).

By 3 & 4 Will. IV. c. 104—When any person shall die, seised of or entitled to any estate or interest in lands, tenements, or hereditaments, corporeal or incorporeal, or other real estate, which he shall not have charged with or devised subject to the payment of his debts, the same shall be assets to be administered in equity for the payment of the debts of such persons, as well those due on simple contract as on specialty; and the heirs and devisees of such debtor shall be liable to all the same suits in equity at the suit of the creditors, whether by simple contract or by specialty, as the heirs or devisees of persons who died seised of freehold estates were before the passing of the act liable to in respect of such freehold estates, at the suit of creditors by specialty in which the heirs were bound. Provided, that in the administration of assets under the act, all creditors by specialty, in which the heirs are bound, shall be paid before any of the creditors by simple contract or by specialty, in which the heirs are not bound.

(*g*) *Cleverly v. Brett*, cited 5 T. R. 8. As to payment of interest on legacy being an admission of assets in equity, see *Postlethwaite v. Mounsey*, 6 Hare, 34, n.

(*h*) *Barry v. Rush*, 1 T. R. 691; *Child v. Moring*, 2 B. & B. 460, *acc*.

(*i*) *Worthington v. Barlow*, 7 T. R.

453; *Riddell v. Sutton*, 5 Bingh. 200, *acc*.

(*k*) *Pearson v. Henry*, 5 T. R. 6. So in equity executors may render themselves personally liable to pay legacies, by admitting assets. See cases collected in a note to *Payne v. Little*, 22 Beav. 72.

VII. Of Actions by Executors and Administrators.

1. *What Actions may be brought by Executors and Administrators.*—By the common law, executors might maintain actions to recover *debts* due to their testator, but they could not maintain actions for a *wrong* done to their testator in his lifetime; *e.g.* a trespass in taking his goods, &c. But by 4 Edw. III. c. 7—"the executors in such cases shall have an action against the trespassers, and recover their damages in like manner as they, whose executors they be, should have had, if they were in live—."

This statute has been expounded largely, with respect to the persons and the actions. With respect to the persons, it has been held, that an administrator is within the equity of the statute, and shall have trespass for goods carried away in the lifetime of the intestate (*l*). With respect to the actions, it has been resolved that where, upon a church becoming void, the bishop collated wrongfully and the patron died, the executor of the patron might on the equity of this statute maintain a *quare impedit* (*m*). And an *ejectio firmæ* will lie at the suit of an executor for the ouster of his testator (*n*). So an executor may have an action of trover for the conversion of the testator's goods in his lifetime (*o*); or an action on the case against the sheriff for a false return made in the life of the testator to a *fi. fa.*, *viz.*, that he levied only part of what he had in fact taken (*p*); or an action of debt on a judgment against an executor, suggesting a devastavit in the lifetime of the plaintiff's testator (*q*). In like manner, it has been held, that an administrator may maintain an action against the bailiff of a liberty for executing a *fi. fa.* and removing the goods off the premises, before the landlord (the intestate) was paid a year's rent, pursuant to 8 Ann. c. 14 (*r*). By the 25 Edw. III. stat. 5, c. 5, the remedy given by the above statute (4 Edw. III. c. 7) was extended to executors of executors.

Formerly no remedy was provided by law for injuries to the real estate of any person deceased, committed in his lifetime; but by 3 & 4 Will. IV. c. 42, s. 2—"An action of trespass, or trespass on the case, as the case may be, may be maintained by the executors or administrators of any person deceased for any injury to the *real estate* (*s*) of such person committed in his lifetime, for which an action might have been maintained by such person, so as such injury shall have been committed within six calendar months

(*l*) *Smith v. Colgay*, Cro. Eliz. 384.

(*m*) *Anon.*, 4 Leon. 15, cited in *Le Mason v. Dixon*, Sir W. Jones, 174.

(*n*) 7 Hen. IV. 6, b.; Bro. Abr. Exor. 45, S. C.

(*o*) *Rutland v. Rutland*, Cro. Eliz. 377.

(*p*) *Williams v. Grey*, Ld. Raym. 40.

(*q*) *Berwick v. Andrews*, Ld. Raym. 973.

(*r*) *Palgrave v. Windham*, Str. 212.

(*s*) Whether this includes chattel interests, *quære*? See Wms. on Exors. 710 (5th edit.); *Adam v. Inhabitants of Bristol*, 2 A. & E. 389.

before the death of such deceased person: and provided such action shall be brought within one year after the death of such person; and the damages, when recovered, shall be part of the personal estate of such person" (t).

No action lay at common law by the executor for an injury to the *person* of the deceased. But by 9 & 10 Vict. c. 93, s. 1—Whenever the death of a person shall be caused by wrongful act, neglect or default, such as would (if death had not ensued) have entitled the party injured to maintain an action, the person who would have been liable if death had not ensued, shall be liable to an action for damages, notwithstanding the death of the person injured, and although the death shall have been caused under such circumstances as amount in law to felony. Sect. 2 points out the persons for whose benefit the action is to be brought, and the mode of assessing the damages, and directs that it shall be brought by the executor or administrator. By 27 & 28 Vict. c. 95, s. 1, if there is no executor or administrator, the action may be brought by any of the persons for whose benefit it would have been brought if there had been. If the deceased has accepted compensation for his claims the executors cannot maintain an action, for although sect. 2 provides a new principle for the assessment of the damages, it does not give any new right of action (u). By the 3rd section, the action must be commenced within twelve calendar months of the death of the deceased person.

Every action brought by an executor, that is founded upon a duty accrued in the testator's lifetime, must be brought in the *detinet* only (x), that is, in his representative capacity. Where the cause of action accrues after the testator's death, the executor may sue as such, or in his individual capacity, at his option (y). And generally, whenever the subject-matter of the action would, when recovered, be assets, the executor may sue in his representative capacity (z); as for money paid over by the executor by mistake (a). But where the executor or administrator takes a *bond* from a simple contract debtor of deceased, though it be given to him as executor, yet he cannot sue in his representative capacity on the bond, for the bond operates as a merger of the simple contract debt, and creates a new and *personal* obligation of a higher nature (b).

P. orally agreed to grant defendant a lease for sixty years. Defendant paid part of the consideration money, but P. died before the contract was carried into effect. Plaintiffs, P.'s executors, then granted the lease, which recited that P.'s agreement had been

(t) See *Powell v. Rees*, *post*, p. 716.

(u) *Read v. The Great Eastern Railway*, L. R. 3 Q. B. 558; see *Blake v. The Midland Railway*, 18 Q. B. 109; *Pym v. The Great Northern Railway*, 4 B. & S. 406; 32 L. J., Q. B. 379.

(x) 1 Wms. Saund. 111, a., n. (1).

(y) *Gallant v. Bouteflower*, 3 Doug. 36, *per Buller, J.*

(z) *Marshall v. Broadhurst*, 1 Cr. & J. 405.

(a) *Clark v. Hougham*, 2 B. & C. 149.

(b) *Hosier v. Lord Arundell*, 3 B. & P. 7.

treated as void by the Court of Chancery, and that the lease was granted pursuant to a proposal of the plaintiffs. Plaintiffs having paid their own attorney his charges for drawing the lease, it was held, that they were entitled to sue the defendant for money paid, in their own right (c). Where A. contracted with the defendant to perform certain work for a specified sum, to be paid for when the work was completed, but died before its completion, and his administrator agreed with the defendant to complete, and did complete, the work, and then sued the defendant, alleging that the defendant in A.'s lifetime was indebted to A., *in his lifetime*, for goods sold and delivered, work and labour, &c.; it was held, that the facts did not support the declaration, for that, the contract being entire, and the work unfinished at A.'s death, no debt ever accrued from the defendant to A., although the new agreement between the plaintiff and the defendant amounted as between them to a rescinding of the original contract with A., which would entitle the plaintiff, as administrator, to recover (if the declaration had been properly framed) on a *quantum meruit* for the work done by A. (d).

By 11 Geo. II. c. 19, s. 15, the executor or administrator of a tenant for life, on whose death any lease of lands determines, may recover from the under-tenant the whole or a proportion of the rent reserved, according to the time such tenant for life lived of the last year, quarter, &c., in which the rent was growing due. By the 4 & 5 Will. IV. c. 22, s. 1, this provision was extended to persons not strictly tenants for life, and to all other payments of every description coming due at fixed periods, and the determination by any means whatsoever of any person's interest therein. See the sections at length, *ante*, p. 542, tit. "Debt:" "Eviction." By stat. 1 Vict. c. 26, s. 6,—If no disposition by will shall be made of any estate *pur autre vie* of a freehold nature, the same shall be chargeable in the hands of the heir, if it shall come to him by special occupancy, as assets by descent, as in the case of freehold land in fee simple; if there shall be no special occupant, the estate shall go to the executor or administrator of the party that had the estate by virtue of the grant (e); and if the same shall come to the executor or administrator, either by reason of a special occupancy or by virtue of the act, it shall be assets in his hands, and shall be distributed as the personal estate.

By the common law, an executor or administrator could not have an action of account; because it was founded on a matter in the privity of a testator (f); but by 13 Edw. I. c. 23, an executor shall have an action of account upon an account with his testator. By 25 Edw. III. stat. 5, c. 5—"Executors of executors shall have

(c) *Grissell v. Robinson*, 3 B. N. C. 10.

(d) *Crosthwaite v. Gardner*, 18 Q. B. 640. *Semble*, that the declaration might have been amended. *Per Erle, J., S. C.*

(e) *Bearpark v. Hutchinson*, 7 Bingh. 178.

(f) 2 Inst. 404.

actions of debts, accompts, and of goods carried away of the first testators, &c., in the same manner as the first testator should have had."

Administrators derive their authority to bring actions from the 31 Edw. III. stat. 1, c. 11, which provides, that "where a man dieth intestate, the ordinaries shall depute the next and most lawful friends of the dead person intestate to administer his goods, which deputies shall have an action to demand and recover, *as executors*, the debts due to the intestate, &c." A subsequent statute, 21 Hen. VIII. c. 5, s. 3, in case of intestacy or executors refusing to prove, directs the ordinary to grant administration to the widow or next of kin, or both; and where two or more stand in equal degrees of relationship, to accept which he pleases. This jurisdiction is now exercised by the Court of Probate.

Plaintiff, as administrator, declared in assumpsit, that the defendant, for certain fees to be paid to him by the intestate, undertook as an attorney to investigate the title of premises about to be conveyed to intestate. Breach, that he omitted to do so, and that intestate, in consequence, took an insufficient title, whereby his personal estate was injured. A demurrer to this declaration was overruled (*g*). And where a vendor omits to make out a good title within the stipulated time, and the vendee dies, his executor may sue for damage accruing to the personal estate by loss of interest on the deposit-money (*h*), and the expense of endeavouring to procure the title (*i*). An administrator cannot have an action for a breach of promise of marriage to the intestate, where no special damage to the personal estate is alleged (*k*). Although the decisions in the last-mentioned three cases turned upon the damage to the personal estate, yet it seems, the right of an executor or administrator to sue on a breach of contract made with the deceased is not confined to cases in which such damage can be stated. For instance, an executor is entitled to sue the lessee of his testator for the breach of a covenant, purely collateral, committed in the lifetime of the testator, without alleging special damage to the personal estate in his declaration (*l*). But an executor cannot sue on a breach of a covenant which runs with the land, where a formal breach only has taken place in the testator's lifetime; in that case the real representative is entitled to recover for any substantial damage incurred after his death (*m*).

An executor may sue the Bank of England for not transferring stock of the testator into the names of himself or his appointee,

(*g*) *Knight v. Quarles*, 2 B. & B. 102.

(*h*) From the day when the contract should have been completed. *De Bernales v. Wood*, 3 Campb. 258.

(*i*) *Orme v. Broughton*, 10 Bingh. 533.

(*k*) *Chamberlain v. Williamson*, 2 M. & S. 408.

(*l*) *Raymond v. Fitch*, 2 C. M. & R. 588; *Ricketts v. Weaver*, 12 M. & W. 718, *acc.*

(*m*) *Kingdon v. Nottle*, 1 M. & S. 355; and 4 M. & S. 53; *King v. Jones*, 4 M. & S. 188.

notwithstanding such stock has been specifically bequeathed (*n*); for the Bank has nothing to do with the distribution of the fund, but is bound to pay to the executor, who is the legal owner (*o*). And now, by 8 & 9 Vict. c. 91, s. 1, it is expressly enacted, that all stock standing in the name of any deceased person may be transferred by the executors, notwithstanding any specific bequest thereof, but the probate, &c., must be first left at the Bank for registration, and the Bank may require all the executors to join in the transfer.

2. *Executors and Administrators must join in bringing Actions*.—It is a general rule, that if there are two or more executors, and one proves the will, they must all join in bringing actions; and if they do not, the defendant may plead in abatement, that there are other executors living not named (*p*). In this plea it is not necessary to aver, that the executors not named have administered; because they may administer at their pleasure (*q*). So where there are two or more administrators, it is necessary that they should join in bringing actions (*r*). And this rule, viz., that all the executors shall join, holds even where some of the executors refuse before the ordinary (*s*), because the refusing executors may come in at any time (*t*) and administer notwithstanding their refusal, either during the lives of their co-executors, who have proved, or after their death (*u*). The like law is, where some of the executors are infants; they must all join, and they can all appear by attorney: for those of full age may appoint an attorney for those within age (*v*). The plaintiffs were entitled to leasehold property as executors of one J. S. To prove their title, they produced the probate of the will of J. S., which was granted to one of them, liberty being reserved to make the like grant to the two others named in the will. This was held sufficient (*w*).

One of two executors, having alone proved the will, received a debt due to the testator, which by his will was appropriated to the payment of specific legacies to his grandchildren, with interest thereon, and afterwards permitted the money to be lent out to a third person, by whom it was paid to A. A., on being applied to by the executor, acknowledged that he had received the money, and that it belonged to the testator's grandchildren, but refused to pay it over to the executor; it was held, that both executors might

(*n*) *Franklin v. Bank of England*, 9 B. & C. 156.

(*o*) *Churchill v. Bank of England*, 11 M. & W. 323.

(*p*) Reg. 140, b.; Bro. Abr. Exors. pl. 69; Fitz. Abr. Exors. pl. 48.

(*q*) 41 Edw. III. 22, a.

(*r*) Reg. 140, b.

(*s*) *Hensloe's case*, 9 Rep. 36, b. See

also 3 Atk. 239.

(*t*) Bro. Exors. 117; Fitz. Abr. Exors. 26.

(*u*) 21 Edw. IV. 23, b., 24 a., recognized in *Wankford v. Wankford*, Salk. 307, and *Walters v. Pfeil*, M. & M. 362.

(*v*) *Foxwist v. Tremaine*, 2 Saund. 212.

(*w*) *Walters v. Pfeil*, M. & M. 362.

join in an action brought against A. to recover the money (*x*). But where A. received money under a written authority from two out of three executors who alone had proved the will; it was held, that the action for the money should be at the suit of the two only, unless it were found by the jury that they contracted with A. both on their own account and as agents for the other executor, or generally on account of the estate, with a view to the interference of the other executor, if he chose to take part in the management of it (*y*). So if one of several executors sell the goods of the testator, he may sue alone for the price, not suing as executor (*z*). And two out of three executors may recover in ejectment on a joint demise, the third not having proved (*a*).

3. *Of joining several Causes in one Action by Executors.*—In order to join several causes in one action, the action must be brought as to all such causes in the same right (*b*). Hence, a plaintiff cannot join in the same action, a demand, as executor or administrator, with another demand, which accrued in his own right. The reason is, because the funds, to which the money and costs, when recovered, are to be applied, or out of which the costs are to be paid, are different; and, the damages and costs being entire, the plaintiff cannot distinguish how much he is to have in his representative character, and how much he is to hold as his own.

After much discussion, it is now finally settled, that in all actions by executors or administrators, if the money recovered on each of the counts will be assets, the counts may be joined in the same declaration (*c*). Thus, for instance, a count for work by the plaintiff *as* administrator, may be joined with counts for goods sold and work done by the intestate (*d*). So also counts on promises made to an intestate may be joined with counts on promissory notes, given to the administrator *as* administrator, since the death of the intestate (*e*). The counts so joined to counts on promises to the testator should state, that the duty accrued to the plaintiff in his representative character "*as executor*" (*f*). Where, in a declaration by executors (*g*), a count stating that the defendant had accounted with the plaintiffs, "*executors as aforesaid,*" was joined with counts stating promises to the testator: after verdict and judgment for plaintiffs, a writ of error was brought upon the ground of misjoinder, but the judgment was affirmed.

(*x*) *Webster v. Spencer*, 3 B. & Ald. 360.

(*y*) *Heath v. Chilton*, 12 M. & W. 632.

(*z*) *Brassington v. Ault*, 2 Bingh. 177.

(*a*) *Doe v. Wheeler*, 15 M. & W. 623.

(*b*) Com. Law Proc. Act, 1852, s. 41.

(*c*) 2 Wms. Saund. 117 g. (m.)

(*d*) *Edwards v. Grace*, 2 M. & W. 190.

(*e*) *Partridge v. Court*, 5 Price, 412; (in error) 7 Price, 591.

(*f*) 2 Wms. Saund. 117, h. (6th ed.).

(*g*) *Lancefield v. Allen*, 1 Bligh, N. S. 592.

VIII. Of Actions against Executors and Administrators.

1. *What Actions may be maintained against Executors.*—Formerly an action, wherein the testator might have waged his law, could not be maintained against his executors or administrators (*h*). Hence, *debt* on a simple contract, as on a promissory note (*i*), would not lie against an executor or administrator. But now wager of law is abolished (*k*); and debt on simple contract is maintainable in any court of common law against any executor or administrator (*l*). Assumpsit might always have been brought (*m*). By 4 Ann. c. 16, s. 27 (*n*), an action of account is given against the executors and administrators of guardians, bailiffs, and receivers, and also by one joint-tenant and tenant in common, his executors, and administrators, against the other, as bailiff, for receiving more than his share, and against the executor and administrator of such joint-tenant or tenant in common.

Assumpsit will not lie against an executor for a legacy payable out of the general funds of the testator, although assets be averred in the declaration; for the law will not, from the mere circumstance of an executor's being possessed of assets, imply a promise by him to pay such legacy (*o*). But an action may be maintained by the legatee of a specific chattel, against an executor, after his assent to the bequest (*p*). So an action at law cannot be maintained for a distributive share of an intestate's property against the administrator, nor against his executor, although such executor may have expressly promised to pay (*q*). But where an executor has stated an account with a legatee, and debited himself absolutely with a certain sum as retained in his hands for such legatee, he ceases to hold the money in his character of executor, and an action on an account stated will lie against him (*r*). "It is quite clear that, so long as no other relation exists between two parties than that of trustee and *cestui que trust*, no action can be maintained by the latter against the former, for any money in his hands. The trustee is in such a case the only person entitled at law to the money, and the remedy of the *cestui que trust* is exclusively in a court of equity. When indeed there is no trust to execute, except that of paying over money to the *cestui que trust*, the trustee by his conduct, as, for instance, by admission that he has money to be paid over, or by settling accounts on that footing, may, and often does, make himself liable to an action at law at the suit of the *cestui*

(*h*) Bro. Exors. 80.

(*i*) *Barry v. Robinson*, 1 N. R. 293.

(*k*) 3 & 4 Will. IV. c. 42, s. 13.

(*l*) *Ibid.* s. 14.

(*m*) *Palmer v. Lawson*, 1 Lev. 201; *Norwood v. Read*, Plowd. 181; *Carter v. Fossett*, Palm. 329; *Pinchon's case*, 9 Rep. 86, b.; *Fawcett v. Charter*, Cro.

Jac. 662.

(*n*) See *ante*, pp. 2, 3.

(*o*) *Deeks v. Strutt*, 5 T. R. 690.

(*p*) *Doe v. Guy*, 3 East, 120.

(*q*) *Jones v. Tanner*, 7 B. & C. 542.

(*r*) *Hart v. Minors*, 2 Cr. & M. 700; *Bond v. Nurse*, 10 Q. B. 244.

que trust, for money had and received, or for money due on an account stated" (s).

The neglect or refusal of the administrator to distribute the surplus or residue of the effects of the intestate among the next of kin, according to the Statute of Distributions, without the previous decree or sentence of the court, is not a breach of the condition of the administration bond (t).

An acting executor having once received, and fully had under his control, assets of the testator applicable to the payment of a debt, is responsible for the application thereof to that purpose; and, such application having been disappointed by the misconduct of his co-executor, whom he employed to make the payment in question, he is liable at law for the consequences of such misconduct, as much as if the misapplication had been made by any other agent of a less accredited and inferior description (u). If one co-executor lends the testator's money which has come to his hands, and which the testator had directed to be laid out on good security, to the other executor on his bond, it is a devastavit (x).

Formerly, no remedy was provided by law for *wrongs* done by a person deceased in his lifetime to another, in respect of his property, real or personal (y); but by 3 & 4 Will. IV. c. 42, s. 2—"An action of trespass, or trespass on the case, as the case may be, may be maintained against the executors or administrators of any person deceased, for any wrong committed by him in his lifetime to another, in respect of his property, real or personal, so as such injury shall have been committed within six calendar months before such person's death, and so as such action shall be brought within six calendar months after such executors or administrators shall have taken upon themselves the administration of the estate and effects of such person; and the damages to be recovered in such action shall be payable in like order of administration as the simple contract debts of such person." An intestate was lessee of some coal mines of the plaintiffs, and had worked the coal under a portion of land excepted from the demise; part of such coal was raised more than six months before the intestate's death, and part within

(s) *Per Rolfe, B., Pardoe v. Price*, 16 M. & W. 451.

(t) *The Archbishop of Canterbury v. Tappen*, 8 B. & C. 151.

(u) *Crosse v. Smith*, 7 East, 246. By the old law, there was a distinction between executors and trustees. It was laid down as a general rule, that where executors joined in a receipt, both having the whole power over the fund, both were chargeable; where trustees joined, each not having the whole power, and the joining being necessary, only the person receiving the money was charge-

able; but the rule as to executors has been in some degree relaxed. See *per Lord Eldon, Ch., in Chambers v. Minchin*, 7 Ves. 197. In *Walker v. Symonds*, 3 Swans. 64, the same learned judge said, "It may be laid down now, as in *Brice v. Stokes* (11 Ves. 319), that though one executor has joined in a receipt, yet whether he is liable shall depend on his acting." *Terrell v. Matthews*, 1 Mc. & G. 433, *acc.*

(x) *Gleeson v. Atkin*, 7 Tyrw. 598.

(y) *Hambly v. Trott*, Cowp. 371.

six months; it was held, that the plaintiffs might bring trespass under the statute for so much as was raised within the six months, and also money had and received for so much as was raised before, the acts being distinct, and, therefore, the two actions not incompatible (z). The foregoing statute is confined in terms to injuries in respect of *property*, real or personal; the law, therefore, in respect of injuries to the person remains unaltered, as to which see note (1) to *Wheatley v. Lane*, 1 Wms. Saund. 216, a.

By 29 Car. II. c. 3, s. 4—"No action shall be brought to charge any executor or administrator upon any special promise, to answer damages out of his own estate, unless the agreement upon which such action shall be brought, or some memorandum or note thereof, shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized." At the common law, an executor or administrator could not have been charged on any special promise to answer damages out of his own estate, unless such promise had been made on a sufficient consideration. The statute has not made any alteration in this respect. The promise, though in writing, still requires a sufficient consideration to support it (a), *e. g.* the possession of assets (b). The consideration as well as the promise need no longer be expressed in the written memorandum or note (c).

The provisional assignee of the Insolvent Debtors' Court (under 1 Geo. IV. c. 119, s. 7) assigned the estate of an insolvent to an assignee, who assented to such assignment, and acted under it as tenant of premises, which the insolvent held as lessee for years: it was held, that the executor of such last-mentioned assignee was liable to the lessor for breaches of covenants in the lease, subsequent to his testator's death; if not appearing that the Insolvent Debtors' Court had appointed fresh assignees (d).

By 20 Car. II. c. 7, s. 2, (made perpetual by 4 & 5 W. & M. c. 24, s. 12,)—"The executors and administrators of executors of their own wrong, or administrators who have wasted and converted the assets of the deceased to their own use, shall be chargeable in the same manner as their testator or intestate would have been if living. A doubt having arisen upon the preceding clause, whether it extended to the executors and administrators of any executor or administrator of right, who, from want of privity, were not before answerable for the debts due from the first testator or intestate, although such executor or administrator of right had been guilty of a devastavit or conversion, it was enacted, by 4 & 5 W. & M. c. 24, s. 12,—that the executor and administrator of such executor or administrator

(z) *Powell v. Rees*, 7 A. & E. 426.

(a) *Rann v. Hughes*, 7 T. R. 350, n.

(b) *Pearson v. Henry*, 5 T. R. 6.

(c) Mercantile Law Amendment Act,

s. 3. See *post*, tit. "Statute of Frauds."

(d) *Abercrombie v. Hickman*, 8 A. & E. 683.

of right, who shall waste or convert to his own use the estate of his testator or intestate, shall be chargeable in the same manner as his testator or intestate would have been.

2. *What Causes of Action may be joined against Executors.*—Several demands, some of which accrue from the defendant in his own right, and others in right of another, cannot be joined in the same action; because such demands require different pleas and different judgments (*e*). Hence, if a declaration against an executor or administrator contain counts which charge him in his representative character, and also counts which charge him in his own right, such declaration will be bad, for misjoinder of cause of action, either on demurrer, or in arrest of judgment, or on error (*f*). So counts on promises by the testator cannot be joined with counts for money had and received by the defendant as executor (*g*); or for money lent to the defendant as executor (*h*); or for interest for the forbearance by the plaintiff to the defendant as executor, *at his request*, of money owing from the defendant as executor to the plaintiff (*i*); because the former charge the defendant in right of the testator, whereas the latter charge him in his own right. But where an action was brought against an administratrix, and the three first counts of the declaration were on promises by the intestate, and the last was on an account stated between the plaintiff and defendant, as administratrix, of money owing *from the intestate*, with a promise by the defendant, as administratrix, to pay, the court were of opinion, that there was not any misjoinder of action, for that the defendant was charged as administratrix in all the counts (*k*). So where, to a count for money had and received by the defendant as executor was joined a count on an account stated, of money due from the defendant *as executor*, it was held, that there was a misjoinder (*l*); for on the first count the judgment would be *de bonis propriis*, but on a count averring an account stated by the defendant of monies due from him as executor, the judgment shall be *de bonis testatoris*. This count may, therefore, be joined with counts on promises of the testator (*m*). So counts for goods sold to, and work and labour done for, the defendant, as executor, cannot be joined with a count for money found to be due on an account stated with the defendant as executor; for the two first counts are necessarily for debts due from the defendant in his own right, and charge the defendant personally, whereas the last count charges the defendant in his representative character (*n*). But a count for money paid to the use of the

(*e*) *Jennings v. Newman*, 4 T. R. 347.

(*f*) *Brigden v. Parks*, 2 B. & P. 424.

See Com. Law Proc. Act, 1852, s. 41.

(*g*) *Brigden v. Parks*, 2 B. & P. 424.

(*h*) *Rose v. Bowler*, 1 H. Bl. 108.

(*i*) *Bignell v. Harpur*, 4 Exch. 773.

(*k*) *Secar v. Atkinson*, 1 H. Bl. 102.

(*l*) *Ashby v. Ashby*, 7 B. & C. 444.

(*m*) *Powell v. Graham*, 7 Taunt. 580.

(*n*) *Corner v. Shew*, 3 M. & W. 350.

defendant as executor, may be joined with counts on promises by the testator (o).

A promise made upon good consideration by a testator, that his executor shall pay, is a sufficient consideration for an action of assumpsit against the executor. And in such action, it is neither necessary to aver assets (the want of assets being matter of defence); nor a promise by the executor (p). To a count in covenant charging the defendants, as executors, for breaches of covenant by their testator as lessee, who had covenanted for himself, his executors and assigns, may be joined another count, charging them that after the testator's death, and their proving the will, and during the term, the demised premises came by assignment to one D. A., against whom breaches were alleged; and concluding, that so neither the testator, nor the defendants after his death, nor D. A. since the assignment to him, had kept the said covenant, but had broken the same (q).

3. *What Executors are to be made Defendants.*—It has been observed (*ante*, p. 712) that in actions brought by executors, it is necessary that, where there are two or more, they should all join, whether they administer or not, if one of them has proved the will. But this is not necessary when actions are brought *against* them (r); for the mere circumstance of a person being named executor does not compel the plaintiff to make him a defendant unless he has administered. Hence, where executors, *defendants*, plead in abatement, that there are other executors not named, they must add, that the executors not named have administered; for the plaintiff is bound to take notice of such executors only as have administered (s). Although executors cannot sever in declaring, yet they may in pleading. Hence, although infant executors may sue by attorney with executors of full age, because those of full age may appoint an attorney for those within age, yet they must defend by guardian (t). If any of the executors die, actions must be brought, not against the surviving executors and the executors of the deceased executors, but against the surviving executors only (u). If there are two or more administrators, they must all be made defendants (x). An executor *de son tort* must be declared against as a rightful executor (y). In an action against a married woman executrix, the husband must be joined as a defendant (z).

(o) Wms. Exors. 1607 (5th edit.).

(p) *Powell v. Graham*, 7 Taunt. 580.

(q) *Wilson v. Wigg*, 10 East, 313.

(r) Bro. Exors. pl. 69.

(s) *Swallow v. Emberson*, 1 Lev. 161;

Ryalls v. Bramall, 1 Exch. 734.

(t) *Frescobaldi v. Kinaston*, 2 Str. 783; Fitz. Abr. Exors. 22.

(u) 4 Leon. 193; Bro. Exors. 99; Fitz. Abr. Exor. 22. Unless the executor of the executor administer [with the other. 1 Roll. Abr. 928, tit. Executors (Z).

(x) Reg. 140, a, b.

(y) *Alexander v. Lane*, Yelv. 137.

(z) Com. Dig. Administration (D.).

IX. *Of the Pleadings,—Right of Retainer.*

An executor may plead the same plea in bar, that his testator might have pleaded; as, in an action of assumpsit, he may plead, that his testator did not undertake or promise; or in covenant or debt on bond, that it is not the deed of the testator (*a*). He may also plead in bar, that he has fully administered all the goods and chattels which were of the deceased at the time of his death. This is termed a plea of *plene administravit*.

A testator being indebted to R., deposited with him a policy of insurance on testator's life as a security for the debt, or for a further advance then made by R., and died, leaving R. and M. his executors. R., still holding the policy, applied to the insurers for the amount due on it (200*l.*); which they refused to pay, unless R. and M. gave a receipt for it as executors. They did so; R. making protest that he signed as executor, merely to satisfy the insurers. In an action by a judgment creditor, to which the executors pleaded *plene administraverunt*, except as to 4*l.* (the surplus out of the 200*l.* after payment to R.), it was held that the executors were not chargeable with the 200*l.* as assets, but only with the surplus after payment to R. (*b*). An executor must *plead* an outstanding debt, *e. g.* a judgment, and cannot give it in evidence under *plene administravit* (*c*). In this plea it is not necessary for the executor to aver that the judgment was had for a true and just debt; for, if it be not so, this shall come from the other side (*d*). So where an executor pleaded, that his testator entered into a bond conditioned for the payment of a sum of money at a day past, beyond which he had not assets; it was held sufficient, although it was not averred that the bond was entered into for a true and just debt; for it shall be intended that it was (*e*). And the same intendment shall be made, where an executor or administrator pleads a bond debt due to himself and retainer (*f*).

When the day of payment, mentioned in the condition of the bond, is past in the lifetime of the testator, the penalty is the legal debt; and although an executor, in pleading it as an outstanding debt, sets forth the condition of the bond, yet that will not deprive him of the advantage of covering the assets to the amount of the penalty (*g*). But when the day of payment is not arrived at the

(*a*) Com. Dig. Pleader (2 D. 8).

(*b*) *Glaholm v. Rowntree*, 6 A. & E. 710.

(*c*) Wms. Exors. 1787 (5th edit.)

(*d*) *Palmer v. Lawson*, 1 Lev. 200.

(*e*) *Lake v. Raru*, Carth. 8.

(*f*) *Picard v. Brown*, 6 T. R. 550.

(*g*) But the best way is to plead honestly and truly, and though there is a judgment for a penalty to show how

much is due; *Parker v. Atfield*, 1 Salk. 312; for the plaintiff may, it seems, reply that the creditor would have accepted a less sum, but that the defendant would not pay it, and kept the judgment on foot by fraud, and under this plea may give evidence of such matter as will avoid the penalty. Wms. Exors. 1776 (5th edit.).

death of the testator, if the executor sets forth the condition, the assets can be covered only to the amount of the sum mentioned in the condition; for the force of the bond is suspended until the condition is broken (*h*). To an action of debt on bond for 300*l.* against defendant, as executor, he pleaded that the testator was bound in a statute for the same sum, and that he had assets to the amount of 80*l.* only, to satisfy that statute, which remained yet in force and not paid. On demurrer, it was objected, that it was not averred in the plea, that the statute was made for *debt*, and that the debt was not satisfied; for, if it were for the performance of covenants, it was not reasonable that it should be a bar to a debt on a bond already due, when, perhaps, the covenants would never be broken (*i*), in which case there would not be any cause of suit or extent thereon. But the court resolved, that the plea was good; for it was averred that the statute was in force, and the money not paid; it was good enough *prima facie*; and it should be intended to be made for a just debt, until the contrary was shown (*k*).

If an action be brought against several administrators, they may plead an outstanding judgment recovered against one of them, and no assets *ultra*; for a recovery against one administrator shall bind him and his companions (*l*). After the commencement of an action, an executor cannot pay another creditor before such other creditor has recovered judgment, but the executor may confess judgment in another action for the damages laid in the declaration, without ascertaining those damages by writ of inquiry, provided they do not exceed the real debt. If they do, the plaintiff may reply that such judgment was not for a true and just debt (*m*). An executor may confess a judgment to a creditor in *equal degree* with the plaintiff, pending the action, and plead it in bar (*n*). But if a plea of judgment recovered on a simple contract be pleaded by an executor to a debt on bond, it must be averred that such recovery was had before notice of the bond debt (*o*). So an executor may plead *pais darrein continuance* (*p*), judgments recovered against him in suits commenced since he pleaded the general issue in bar in the principal case (*q*). But a judgment confessed by an executrix to a creditor of the testator, as well for his own debt as in trust for the debt of *other* creditors, cannot be pleaded in bar

(*h*) *Bank of England v. Morice*, 2 Str. 1028.

(*i*) It was agreed that a statute for performance of covenants was not a bar in debt on bond, if none of the covenants were broken. Neither is it to an action on simple contract. *Collins v. Crouch*, 13 Q. B. 542.

(*k*) *Philips v. Echard*, Cro. Jac. 8.

(*l*) *Further v. Further*, Cro. Eliz. (471).

(*m*) *Waring v. Danvers*, 1 P. Wms.

295; 10 Mod. 496; 3 P. Wms. 401.

(*n*) *Waring v. Danvers*, 1 P. Wms. 295; *Morrice v. Bank of England*, Ca. Temp. Talb. 225. Executors are bound to take notice of debts of record, such as judgments; Wms. Exors. 927 (5th edit.); and, it seems, whether registered or not. *Ibid.* 903.

(*o*) *Sawyer v. Mercer*, 1 T. R. 690.

(*p*) See *ante*, p. 167.

(*q*) *Prince v. Nicholson*, 5 Taunt. 665.

to an action brought against her by another creditor of the testator (*r*).

To a plea of an outstanding judgment, the plaintiff may reply, that the judgment was obtained by fraud ; and may upon this issue give in evidence either that the debt is not a just one, or that less is due than the sum for which the judgment has been given (*s*). But evidence of the latter fact is not conclusive of fraud, for the judgment might have been entered for more than was due by mistake (*t*). If it appear that the judgment creditor would have taken less than is recovered, that is evidence of fraud ; but the executor may show, in answer, that he has not assets sufficient to satisfy even that amount, for that disproves the fraud (*u*).

Where the Statute of Limitations is pleaded to an action brought by an executor on a promise made to his testator, the six years are computed from the time when the action first accrued to the testator, and not from the time of proving the will (*x*), and the executor cannot maintain an action for a debt which accrued to his testator, and for which he might have sued more than six years before the issuing of the writ (*y*). But where money belonging to the estate of an intestate is received by A. *after* the death of the intestate, and, more than six years afterwards, B. takes out administration, the time of limitation must be computed from the day on which the administration was granted ; and, consequently, if B., within six years from that day, brings an action for money had and received against A., the Statute of Limitations will not operate as a bar (*z*). So in an action by an administrator upon a bill of exchange, payable to the intestate, but accepted *after* his death, the Statute of Limitations begins to run from the time of granting the letters of administration, and not from the time the bill becomes due, there being no cause of action until there is a party capable of suing (*a*). "Where letters of administration have been granted, the administrator is entitled to all the rights which the intestate had at the time of his death vested in him ; but no right of action accrues to the administrator, until he has sued out the letters of administration" (*b*). An executor is not bound to plead the Statute of Limitations to a just debt, even although the personal estate is insufficient for the payment of his debts (*c*).

As to the proper mode in which an executor of an executor

(*r*) *Tolputt v. Wells*, 1 M. & S. 395.

(*s*) 2 Wms. Saund. 50, n. (3).

(*t*) *Pease v. Naylor*, 5 T. R. 80. In this case the defendant had informed the plaintiff of that fact before action.

(*u*) *Parker v. Atfield*, 1 Salk. 312, *per Cur.*

(*x*) *Hickman v. Walker*, Willes, 27.

(*y*) *Penny v. Brice*, 18 C. B. (N. S.)

393.

(*z*) *Curry v. Stephenson*, Carth. 335 ; 2 Salk. 421 ; 4 Mod. 372, S. C.

(*a*) *Murray v. East India Company*, 5 B. & Ald. 204. But an executor may commence an action before probate. Wms. Exors. 260 (5th edit.).

(*b*) *Per Bayley, J., Pratt v. Swaine*, 8 B. & C. 287.

(*c*) *Lewis v. Romney*, L. R. 4, Eq. 451.

should frame his plea, the following case deserves attention :—Plaintiff, assignee of lessee for years, sued the defendant as executor of B., executor of A., the lessor, in covenant upon the original indenture of lease, for a breach of the covenant for quiet enjoyment by A., and since his decease by defendant. The defendant pleaded, that he had fully administered all the goods of A., the first testator. On demurrer, it was held, that the plea was bad, inasmuch as it only gave an answer to one part of a case which pointed at two kinds of misapplication of those funds which were liable to the plaintiff's demand (*d*). *Le Blanc*, J., observed that the defendant might discharge himself in two ways: either by showing that the first executor fully administered all the goods and chattels of A. which came to his hands, and that the defendant, since the death of the first executor, had duly administered all that he had received of A.'s assets; or he might show that he had received no assets of the first executor. But, as the plea now stands, he leaves unanswered everything respecting the assets of the first testator which came to the hands of his executor, and merely answers as to his own application. *Bayley*, J., added that the plaintiff was entitled to recover his debt in either of two events; if the defendant had received assets of the original testator, and had not properly applied them; or if the defendant had received assets of the first executor, and the first executor had received assets of his testator, and had not duly applied them. The defendant has only answered as to one of those events, but the plaintiff may be entitled to satisfaction out of both funds: and, therefore, he is entitled to have the issue so framed, that if anything be forthcoming to him out of either fund, he may be able to avail himself of it. As to pleading the Statute of Limitations, and Statute of Set-off, by and against executors, see *ante*, tit. "Assumpsit," and tit. "Debt."

Of the Right of Retainer (e).—A lawful executor or administrator, when sued by a creditor of the deceased, may claim a right of retaining the assets in satisfaction of a debt due to himself, provided such debt is equal or superior in degree to that claimed by the creditor (*f*). And it is optional with the executor either to plead the retainer, or to give it in evidence under a plea of *plene administravit* (*g*). But an executor cannot retain for a demand, of which no account can be taken by a jury, *e.g.* a partnership debt, and which cannot, therefore, be controverted by the other party (*h*). Where an action is brought against a defendant as *executor* (which

(*d*) *Wells v. Fydeell*, 10 East, 315.

(*e*) "The rule of this court in cases of retainer is, that unless the party can show a legal right to retain, we never give it him; if he can show a legal right, we never take it away from him." *Per Verney*, M. R., *Chapman v. Turner*, Vin.

Abr. Exors. (D. 2) pl. 2.

(*f*) *Pyne v. Woolland*, 2 Vent. 180; 1 Keb. 285; Sty. 337; *Vaughan v. Browne*, *infra*.

(*g*) 1 Wms. Saund. 333, n. (6).

(*h*) *De Tastet v. Shaw*, 1 B. & Ald. 664.

is the case, as well where the defendant is charged as rightful executor, as when he is charged as executor *de son tort*, and he claims to retain as executor or administrator, he ought to allege the grant of probate (*i*), or administration (*k*), in order that it may appear to the court that he is such a person as is entitled to retain; for an executor *de son tort* is not so entitled (*l*). But where the plaintiff sues the defendant as *administrator*, and he claims to retain as administrator, it is not necessary that the letters of administration should be set forth, because the plaintiff, by his declaration, admits him to be lawful administrator (*m*).

An executor *de son tort* cannot retain for his own debt, although of a superior nature; neither will the consent of the rightful administrator to the retainer, given after action brought by a creditor, alter the case; nor can such executor avail himself of a delivery over of the effects of the deceased to the rightful administrator after action brought, and before plea pleaded, so as to defeat the action of a creditor (*n*). In debt upon bond against the defendant as executor he pleaded a judgment which he had recovered against the deceased, and so justified by way of retainer. Replication, that the defendant was executor *de son tort*. Rejoinder, that after the last continuance the defendant had obtained letters of administration. On demurrer, it was objected, that the rejoinder was a departure from the plea. But the court held, that it was well enough; because the plea did not expressly admit, that defendant had proved the will, but only admitted the defendant's executorship according to the declaration. By the replication it appeared, that the defendant was not charged as a rightful but as a wrongful executor, which could not appear on the declaration, the method of declaring against both of them being the same. And the rejoinder set forth a matter, which made the acting as unlawful executor justifiable; for the subsequent administration related to the death of the intestate, and purged the precedent wrongful executorship, so as to give the defendant the benefit of retaining (*o*). To a declaration for trover and trespass for taking goods of the plaintiff as administrator, the defendant pleaded, that the claims arose by reason only of the defendant being executor *de son tort* of the intestate before grant of administration to the plaintiff, and that, before such grant, the defendant fully administered all the assets which had come to his hands; held, that the plea was bad (*p*). But, although an executor *de son tort* cannot avail himself of his own wrongful act in taking possession of the goods of the deceased, in order to retain a debt for his own benefit, yet he may plead, in answer to the claim of a simple con-

(*i*) *Prince v. Rowson*, 1 Mod. 208.

(*k*) *Caverly v. Ellison*, T. Jones, 23.

(*l*) *Coulter's case*, 5 Rep. 30; *Alexander v. Lane*, Yelv. 137.

(*m*) *Picard v. Brown*, 6 T. R. 550.

(*n*) *Vernon v. Curtis*, 2 H. Bl. 18.

(*o*) *Vaughan v. Browne*, 2 Str. 1106; Andr. 328; 7 Mod. 274, and MS.

(*p*) *Elworthy v. Sandford*, 34 L. J. Ex. 42.

tract *creditor*, that, after action brought, he had disposed of the assets in that course of administration which the law allows, *viz.* by discharging a debt of higher degree as a specialty debt; for if, at any time before plea pleaded, an executor comes to the knowledge of such a debt, he is bound to pay it before a simple contract debt, whether he be a rightful or wrongful executor (*q*). Whether he may show such payment in mitigation of damages (for he cannot plead it in bar) in an action brought against him by the *rightful executor* is perhaps doubtful. It would seem that he may (*r*); provided he acted *bonâ fide* (*s*). In *Woolley v. Clark*, 5 B. & Ald. 744, where the point was decided differently, but without discussion, the executor *de son tort* had sold goods of the testator *after* he had notice of a will subsequent to that under which he assumed to be acting. At law an executor *de son tort* cannot discharge himself unless he hands over the property to the rightful representative before action brought (*t*).

X. Evidence.

In all actions by and against executors or administrators, the character in which the plaintiff or defendant is stated on the record to sue or be sued, shall not in any case be considered as in issue,* unless specially denied, 5 Pl. R. T. T. 1853. In all questions respecting title to *personalty*, the probate or letters of administration with the will annexed are, it is said, the only legal evidence of the will. Trespass for taking goods. On Not Guilty, the defendant admitted that the goods had been in the possession of the plaintiff, but insisted that he, the defendant, had a property in them as executor of I. S., and then produced the original will, by which he was appointed executor. But, *per Raymond*, C. J., "I cannot allow the original will to be evidence to prove a property in an executor; *the probate must be produced*; for, perhaps, the [Ecclesiastical] Court will not allow this to be the testator's will. Besides, until probate, a man dies intestate; and, if the executor dies before probate, his executor shall not be executor to the first testator" (*u*).

All that is requisite, however, either in the case of an executor or administrator, is to show, by legitimate evidence, that the (Probate) Court has given authority to the person to administer (*x*). It is only the act of the (Probate) Court that is to be

(*q*) *Oxenham v. Clapp*, 2 B. & Ad. 309.

(*r*) Wms. Exors. 236 (5th edit.).

(*s*) *Per Lord Campbell*, C. J., *Thompson v. Harding*, 2 E. & B. 630.

(*t*) *Hill v. Curtis*, 1 L. R. Eq. 90; 35 L. J. Ch. 133.

(*u*) *Coe v. Westernham*, Norfolk Summ. Ass. 1725; Serjt. Leeds' MSS.; *Pinney*

v. Pinney, 8 B. & C. 335, *acc.*

(*x*) There is an exception to this in the case of actions for torts, (or substantially for torts, as for money had and received in certain cases;) founded on the *actual possession* of the executor or administrator, in which case the production of probate is not necessary. *Oughton v. Sep-*

proved (y). Hence, before the late Probate Act, it was held sufficient to produce minutes of the proof of the will and sealing of the probate, indorsed on the will by the surrogate and registrar of the Ecclesiastical Court, it being shown that, by the practice of the court, no other record of such grants was kept (z). If the probate be in the hands of the opposite party, a copy of the will is admissible, after notice to admit (a). So after notice to defendants' executors to produce probate, and refusal; it has been held, that an instrument, produced by the officer of the [Ecclesiastical] Court, purporting to be the will of the defendants' testator, and indorsed by the officer as being the instrument whereof probate had been granted to the defendants, and that they had sworn to the value of the effects, is admissible in evidence in an action against defendants for money had and received by their testator (b). So the original Act Book in the Prerogative Court, containing the entry of probate having been granted, &c. (c), or an examined (d), and now (by the 14 & 15 Vict. c. 99, s. 14) a certified (e) copy thereof, is admissible, without giving notice to produce the probate or letters of administration. So where a probate of a will is lost, an exemplification of such probate is admissible (f).

Upon issue joined on a plea of *plene administravit*, the amount of the stamp upon the probate is admissible in evidence; but it is not, it seems, even *prima facie* evidence of the amount of assets received (g). Probate is not admissible to prove declarations of the testator as reputation in questions of pedigree (h). Where a bill of exchange was endorsed, generally, but delivered to A., as administratrix of B., for a debt due to the intestate, and A. died intestate after the bill became due, and before it was paid: it was held, that the administrators *de bonis non* of B. might sue upon the bill; and that their title was sufficiently proved by the letters of administration *de bonis non*, without producing those granted to A., the administratrix (i). A retainer may be given in evidence on *plene administravit* (k); but debts of a higher nature subsisting cannot (l). Upon *plene administravit et issint riens inter mains*, if it be proved that the executor hath goods in his hands, which were the testator's, he may give in evidence, that he hath paid to that value of his own money, and need not plead it specially (m). In case against executor, upon *plene administravit*, the plaintiff must prove his debt, otherwise he shall recover but one penny

pings, 1 B. & Ad. 241; *Elliott v. Kemp*, 7 M. & W. 306.

(y) Wms. Exors. 1745 (6th edit.).

(z) *Doe v. Mew*, 7 A. & E. 240.

(a) *Goldstone v. Tovey*, 6 B. N. C. 274.

(b) *Gorton v. Dyson*, 1 B. & B. 219.

(c) *Cox v. Allingham*, Jacob, 514.

(d) *Davis v. Williams*, 13 East, 232.

(e) *Dorrett v. Meux*, 15 C. B. 142.

(f) *Shepherd v. Shorthose*, 1 Str. 413.

(g) *Mann v. Lang*, 3 A. & E. 699.

(h) *Doe v. Ormerod*, 1 M. & Rob. 466.

(i) *Catherwood v. Chabaud*, 1 B. & C. 150.

(k) *Plumer v. Marchant*, 3 Burr. 1380.

(l) Bull. N. P. 141.

(m) 1 Inst. 283, a.

damages, though there be assets ; for the plea admits the debt, but not the amount (*n*). But in *debt* it is otherwise (*o*).

The allegation that an executor has assets, which the plaintiff has to prove under a plea of *plene administravit*, means *legal assets (p) presently available*. Where, therefore, A. made a promissory note payable on demand to his son B., and by his will devised a freehold house to B., charged with 240*l.* for payment of debts, &c., to be raised within a year after his death (which period had not elapsed at the time of the trial), and, having made B. and C. his executors, died ; and B. afterwards endorsed the note to D., who sued the two executors thereon, and C. pleaded that the note was made payable to B. on demand, and that B., at the time of the indorsement, had assets of the testator in his hands, whereby the note was satisfied ; but the only evidence of assets was the above-mentioned charge of 240*l.* ; it was held, that the plea was not proved, and that the plaintiff, the defendants having omitted to plead *plene administravit*, was entitled to a verdict (*q*).

XI. Judgment.—Costs.

On a plea of *plene administravit* generally, by an executor, the plaintiff may immediately take judgment of assets *quando acciderint (r)*. In debt or writ of revivor (*s*) on this judgment, evidence of such assets only as have come to the executor's hands since the judgment will be received (*t*). Judgment against an executor, in covenant broken by himself, shall be *de bonis testatoris* ; for it is the testator's covenant which binds the executor as representing him ; and therefore he must be sued by that name (*u*). In like manner, upon an obligation made by testator for the performance of covenants, judgment in debt on the bond for a breach of covenant by executor, shall be *de bonis testatoris (x)*. So in debt against an executor on a bond made by testator, if the defendant plead *non est factum*, and it is found against him, judgment shall be for the debt and damages *de bonis testatoris* ; for the executor cannot know whether it be the deed of the testator or not (*y*). In debt on bond against an executor, if the defendant plead "fully administered," and any assets are found in his hands,

(*n*) *Shelley's case*, Salk. 296.

(*o*) *Saunderson v. Nicholle*, 1 Show. 81.

(*p*) "The true test whether assets are legal or equitable, is, not whether the executor or administrator, but whether the *claimant*, can reach them without resorting to a court of equity." Wms. Exors. 1520 (5th edit.). "Legal assets the executor is *bound* to distribute, equitable assets he *may* distribute, but in the distribution of them he is governed by

the rules of equity." *Per Jervis*, C. J., *Lowe v. Peskett*.

(*q*) *Lowe v. Peskett*, 16 C. B. 500.

(*r*) *Noell v. Nelson*, 2 Wms. Saund. 226. See the form, *ibid.* 216, a.

(*s*) Com. Law Proc. Act, 1854, s. 91.

(*t*) *Taylor v. Hollman*, Bull. N.P. 169.

(*u*) *Collins v. Thoroughgood*, Hob. 188.

(*x*) *Castilion v. Executor of Smith*, Hob. 283.

(*y*) Bro. Abr. Exor. pl. 109.

the plaintiff shall have a verdict and judgment for so much *de bonis testatoris* in the hands of the executor, and judgment *quando*, &c., for the residue (*z*). In debt against two executors, if they plead, either collectively or severally, "fully administered," and the jury find that the one has assets and the other has not, the verdict and judgment shall be against him only who is found to have assets, and the other shall go quit (*a*). An executrix, after probate and after judgment recovered against her for a debt due from her testator, by deed assigned all his property and effects to trustees for the benefit of his creditors; it was held the assignment was valid as between the trustees and an execution creditor (*b*).

Costs.—Where the cause of action is such, that the executor might have declared in his own right, he is liable for costs, if he is nonsuited (*c*). Where an executrix pleaded first, *non assumpsit*; 2ndly, *ne unques* executrix; and 3rdly, *plene administravit*; and issues on the first pleas were found for the plaintiff, and on the last for the defendant; it was held, that, the last plea being a complete answer to the action, the defendant was entitled to the general costs of the trial (*d*).

Plaintiff sued as administratrix, upon promises to the intestate, and upon an account stated with her as administratrix of monies due to the intestate, and a promise to pay her: it was held, that it thereby appeared that the contract was one made between *the plaintiff* and another person within the words of 23 Hen. VIII. c. 15, and, therefore, that, after a nonsuit, the defendant was entitled to costs (*e*). Declaration stated, that the defendant being indebted to the testator, at the time of his death, in consideration thereof, promised the plaintiff as executor to pay him the amount. The Statute of Limitations was pleaded; it was held, that the plaintiff being nonsuited was liable to costs, although he did not declare upon an account stated (*f*). But where the action was brought by the executor upon a contract entered into by, or for a wrong done to, the testator, the executor was not liable to costs under the above act (*g*). Now, however, by 3 & 4 Will. IV. c. 42, s. 31, in every action brought by any executor or administrator in right of the testator or intestate, such executor or administrator shall, *unless the court in which such action is brought, or a judge of any of the said superior courts, shall otherwise order*, be liable

(*z*) *Harrison v. Beecles*, cited 3 T. R. 688. Judgment was formerly entered in such a case for the whole debt; *Lee v. Ridford*, 1 Roll. Rep. 58; but execution taken out only for the sum found by the verdict. Wms. Exors. 1790 (5th edit.).

(*a*) *Bellew v. Juckleden*, 1 Roll. Abr. 929, (B.) pl. 5; *Parsons v. Hancock*, 1 M. & M. 330.

(*b*) *The Wolverhampton Banking Com-*

pany v. Marston, 7 H. & N. 148.

(*c*) *Grimstead v. Shirley*, 2 Taunt. 116; *Jones v. Jones*, 1 Bingh. 249.

(*d*) *Edwards v. Bethel*, 1 B. & Ald. 254; *Ragg v. Wells*, 8 Taunt. 129, *acc*.

(*e*) *Jobson v. Forster*, 1 B. & Ad. 6.

(*f*) *Stater v. Lawson*, 1 B. & Ad. 893.

(*g*) *Barnard v. Higdon*, 3 B. & Ald. 213.

to pay costs to the defendant, in case of being nonsuited or a verdict passing against the plaintiff. An executor suing on a count upon promises to himself as executor, stating a consideration, partly of money due to testator in his lifetime, and partly of an account stated with himself as executor, is liable to costs if nonsuited, and cannot be relieved by the court or a judge under this statute (*h*). In order to induce the court to exempt an executor who has failed, from costs, it is not sufficient that the action has been brought *bond fide*, under counsel's advice, and that it has been defeated on a difficult point of law, unless there be improper conduct on the part of the defendant. Unnecessary prolixity in the pleadings is not such conduct: nor omitting to give the plaintiff information, which might have prevented his proceeding with the action, *i. e.* if the plaintiff did not apply for the information (*i*).

(*h*) *Spence v. Albert*, 2 A. & E. 785.

(*i*) *Farley v. Briant*, 3 A. & E. 839.

CHAPTER XX.

FACTOR.

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Of the Nature of the Employment of a Factor.—A factor is an agent, who is commissioned by a merchant or other person to sell goods for him, and to receive the produce. Foreign factors are agents residing here, commissioned by merchants resident abroad, or the contrary. Home factors are agents resident in England, commissioned by merchants also resident in England. A factor is usually paid for his trouble by a commission of so much *per cent.* on the goods sold. But sometimes he acts under a *del credere* commission; in which case, for an additional premium beyond the usual commission, he undertakes for the credit of the persons to whom he sells the goods consigned to him by his principal.

“*Del credere* is an Italian mercantile phrase, which has the same signification as the Scotch word *warrandice*, or the English word *guarantee*. A factor, who has *general* orders to dispose of goods for his principal to the best advantage, is bound to exercise that degree of diligence which a prudent man exercises in his own affairs, and consequently the factor is authorized to dispose of the goods according to the best terms which can be obtained at the time; and if it shall appear that he has done so, and that he has sold the goods to persons in reputed good circumstances at the time, and to whom at that time he would have given credit in his own affairs, he will not be liable to his principal, although some of these should fail; and for such trouble the factor is generally paid by a commission of so much *per cent.* upon the goods sold. According to the above practice the principal runs all the risk, and the factor is sure of his commission whether the event be favourable or not. Many merchants do not choose to run this risk, and to trust so implicitly to the prudence and discretion of their factor; and, therefore, the agreement called *del credere* was invented, by which the factor, for an additional premium beyond

the usual commission, when he sells his goods on credit, becomes bound to warrant the solvency of the purchasers" (a).

In *Grove v. Dubois*, 1 T. R. 112, the effect of a commission *del credere* was discussed, and the court decided that it was not merely a conditional undertaking and guarantee from the person taking it, that he would pay if some other person did not, but that it was an absolute engagement from him, and made him liable in the first instance; and the same doctrine was acquiesced in, and acted upon, in *Bize v. Dickason*, 1 T. R. 285, cited in *Koster v. Eason*, 2 M. & S. 112; but this doctrine has since been questioned, and may now be considered to be overruled, later cases having established, that the commission imports, that if the vendee does not pay, the factor will, and that it is a guarantee from the factor to the principal against any mischief to arise from the vendee's insolvency (b). "A higher reward is paid, in consideration of their taking greater care in sales to their customers, and precluding all question whether the loss arose from negligence or not, and also for assuming a greater share of responsibility than ordinary agents, *viz.* responsibility for the solvency and performance of their contracts by the vendees. This is the main object of the reward being given to them, and though it *may terminate* in a liability to pay the debt of another, that is not the *immediate* object for which the consideration is given" (c). It is not necessary, therefore, that the *del credere* commission should be evidenced by writing under the Statute of Frauds. *S. C.* Where a factor, under a commission *del credere*, sold goods, and took accepted bills from the purchasers, which he indorsed to a banker at the place of sale, and having received the banker's bill (payable to the factor's order) on a house in London, indorsed and transmitted it to his principal, who got it accepted; it was held, that on the failure of the acceptor and drawer of this bill, the factor was answerable for the amount (d).

A factor differs from a broker in some important particulars. A factor may buy and sell in his own name as well as in the name of his principal. A broker is always bound to buy and sell in the name of his principal. A factor is entrusted with the possession, management, control, and disposal of the goods to be bought or sold, and has a special property in them, and a lien on them. A broker, on the contrary, has usually no such possession, management, control or disposal of the goods, and consequently has no such special property or lien. Storey on Agency, s. 34. But the character of factor and broker is, in practical business, frequently combined.

(a) Arg. *Mackenzie v. Scott*, 6 Bro. P. C. 287, Tomlin's edit.

(b) *Hornby v. Lacy*, 6 M. & S. 171. See *Morris v. Cleasby*, 4 M. & S. 574; *Baker v. Langhorn*, 6 Taunt. 519.

(c) *Per Parke, B., Couturier v. Hastie*, 8 Exch. 56.

(d) *Mackenzie v. Scott*, 6 Bro. P. C. 280, Tomlin's edit.

Power and Authority.—By the common law, a factor, as such, had not any authority to pledge, so as to transfer his lien to the pawnee, or to barter (*e*), but only to *sell* the goods of his principal (*f*). Hence, if a factor pledged the goods of his principal, the latter might recover the value of them in trover, against the pawnee, on tendering to the factor what was due to him, without making any tender to the pawnee (*g*). The same rule held with respect to a bill of lading which had been indorsed to a factor by his principal: for the bill of lading, which is the symbol of the delivery of possession, cannot give a factor a greater authority than the actual possession of the goods themselves. Hence, as a factor could not pledge the goods of his principal by a delivery of the goods, so neither could he do it by an indorsement and delivery of the bill of lading; for, although the indorsement of a bill of lading gave the indorsee an irrevocable right to receive the goods, where it was intended as an assignment of the property in the goods, yet it would not have that operation, where it was intended as a deposit only, by a person who was not authorized to make such deposit (*h*). Nor did the factor acquire an authority to pledge, where bills were drawn by the principal in advance of a consignment made to the factor for sale (*i*). But the law on this subject is now altered, see *post*, p. 740.

The mere relation of principal and factor confers ordinarily, and in the absence of any special instructions, an authority to sell, at such times and for such prices as the factor may, in the exercise of his discretion, think best for his employer (*k*); and it is not, it seems, his duty, in the absence of any special contract, to sell for ready money only (*l*). He has not, as a position of law, authority to sell to repay himself advances made to his principal, after notice that he (the factor) requires to be repaid, and contrary to orders given him by his principal, although if there be a well-understood practice with factors to sell to repay themselves advances, such a practice would be evidence that the advances were made on the footing of an agreement that the factor should have an irrevocable authority to sell, in case the principal made default (*m*).

Where goods are permitted to remain at a wharf in the name of a broker, who is *accustomed* to deal in the article, and the broker sells them, the principal will be bound by such sale, although he did not expressly authorize the broker to sell (*n*). But this is not so of a common person, not a general agent, and who is not in the

(*e*) *Guerreiro v. Peile*, 3 B. & Ald. 616.

(*f*) *Shipley v. Kymer*, 1 M. & S. 484; *Boyson v. Coles*, 6 M. & S. 14.

(*g*) *Daubigny v. Duval*, 3 T. R. 604.

(*h*) *Newsom v. Thornton*, 6 East, 17.

(*i*) *Graham v. Dyster*, 6 M. & S. 1.

(*k*) *Smart v. Sandars*, 3 C. B. 380.

(*l*) *Boorman v. Brown*, 3 Q. B. 511; (*in error*) 11 Cl. & F. 1.

(*m*) *Smart v. Sandars*, 5 C. B. 895; *Estaban de Comas app. v. Prost resp.*, 12 L. T. (N. S.) 682, Priv. Ca.

(*n*) *Pickering v. Busk*, 15 East, 38. See also *Whitehead v. Tuckett*, 15 East, 400.

habit of buying and selling for third parties, unless the real owner, by allowing such person to have the possession and *indicia* of property, holds such person out to the world as the real owner (*o*). A factor may sell on credit, although not particularly authorized by the terms of his commission so to do, for such is the daily usage (*p*).

An agent employed generally, to do any act, is authorized to do it only in the usual way of business. Hence, as stock is sold usually for ready money only, a broker employed to sell stock cannot sell it upon credit, without a special authority, although acting *bond fide*, and with a view to the benefit of his principal (*q*). A person who employs a broker on the Stock Exchange, impliedly gives him authority to act in accordance with the rules there established, although such principal may himself be ignorant of the rules (*r*). So where a Liverpool broker, acting for both parties, negotiated a sale by the plaintiff to the defendant of certain wool, "the names of the vessels to be declared as soon as the wools were shipped," and by the custom of Liverpool it was usual, where the contract contained a stipulation that notice of an event should be given by the vendor to the vendee, for the vendor to give notice to the broker, who communicated it to the vendee, it was held that the defendant was bound by such usage, although the broker omitted to communicate such notice to the vendee (*s*). "I consider it to be clear law, that if there is at a particular place an established usage in the manner of dealing and making contracts, a person who is employed to deal or make a contract there has an implied authority to act in the usual way, and if it be the usage that he should make the contract in his own name, he has authority to do so" (*t*).

But "when such an usage or custom is intended to be relied upon, it ought to be clearly and distinctly proved to exist, and to be so general and notorious that persons dealing in the market could easily ascertain it, and must be presumed to have been aware of it; and in our judgment, in order to bind persons who were not aware of it, it must also appear to be a reasonable usage" (*u*). When goods are consigned to joint factors, they are in the nature of co-obligors, and are answerable for one another for the whole (*x*).

According to the general rule of law, a sale by a factor creates a contract between the owner and buyer (*y*). This rule is not affected

(*o*) *Dyer v. Pearson*, 3 B. & C. 38.

(*p*) *Per Willes*, C. J., *Willes*, 406.

(*q*) *Wiltshire v. Sims*, 1 Campb. 258.

(*r*) *Sutton v. Tatham*, 10 A. & E. 27; *Bayley v. Wilkins*, 7 C. B. 886.

(*s*) *Greaves v. Legg*, 11 Exch. 642.

(*t*) *Per Parke*, B., *Baycliffe v. Butterworth*, 1 Exch. 428; see Lord *Kingsdown's* judgment, *Kirchner v. Venus*, 12

Moo. P. C. 361; but see *Bowlby v. Bell*, 3 C. B. 284.

(*u*) *Per Bovill*, C. J., delivering the judgment of the court in *Grissell v. Bristowe*, L. R. 3 C. P. 128; 37 L. J., C. P. 99; acc. *Coles v. Bristowe*, L. R. 6, Eq. 149.

(*x*) *Godfrey v. Saunders*, 3 Wils. 114.

(*y*) *Scrimshire v. Alderton*, 2 Str. 1182. But this is rather an exception to the

by a custom on a Stock Exchange, that a contract made by a broker for an undisclosed principal, shall be regarded as the contract of the broker only (*z*); and it holds even in cases where the factor acts upon a *del credere* commission (*a*). Hence, if a factor sells goods, and the owner gives notice to the buyer to pay the price to him and not to the factor, the buyer will not be justified in afterwards paying the factor; and the owner will be entitled to recover the price in an action against the buyer, unless the factor has a lien on such price (*b*). If a factor sells goods in his own name, the purchaser has a right to set off a debt due from the factor to him in an action by the principal for the price of the goods (*c*). And the rule is the same where the factor sells to an agent without stating at the time that he is selling as factor, and the real purchaser is ignorant of the fact, although his agent, by previously acquired knowledge, knew it (*d*). Where a contract, not under seal, is made with an agent in his own name, for an undisclosed principal, either the agent or the principal may sue upon it; the defendant, in the case where the principal sues, being entitled to be placed in the same situation at the time of the disclosure of the real principal, as if the agent had been the contracting party. This is a well-established rule of law, frequently acted upon in sales by factors, agents, or partners, but it may equally be applied to other cases (*e*). Thus where a factor, acting under a *del credere* commission, sells goods as his own, and the buyer does not know of any principal, the buyer may, in an action brought against him by the principal, set off a debt due to him from the factor (*f*). But if goods are bought by a broker who does not mention the name of his principal, the principal cannot set off against the price of the goods a debt due to him from the broker, but is still liable to the vendor (*g*).

There is, however, a distinction between a factor and a broker. A factor is a person to whom goods are consigned for sale by a merchant residing abroad or at a distance from the place of sale, and he usually sells in his own name, without disclosing that of his principal (*h*); the merchant, therefore, with full knowledge of these circumstances, trusts him with the actual possession of the goods, and gives him authority to sell in his own name. But the broker is in a different situation, he is not trusted with the possession of the goods, and he ought not to sell in his own name. The principal

general rule of law, which is, that in order to bind a principal upon a written contract made by his agent, it should be in his own name, and appear to be his own contract. Storey on Agency, s. 161.

(*z*) *Humphrey v. Lucas*, 2 Car. & K. 152.

(*a*) *Hornby v. Lacy*, 6 M. & S. 166.

(*b*) See *Drinkwater v. Goodwin*, Cowp. 251.

(*c*) Per Lord Tenterden, C. J., *Taylor v. Kymer*, 3 B. & Ad. 334.

(*d*) *Dunn v. Norwood*, 8 L. T. (N. S.) 241.

(*e*) *Sims v. Bond*, 5 B. & Ad. 389.

(*f*) *George v. Clagett*, 7 T. R. 359.

See *Blackburn v. Scholes*, 2 Campb. 343; *Purchell v. Salter*, 1 Q. B. 197.

(*g*) *Waring v. Favenck*, 1 Campb. 85.

(*h*) See *Johnston v. Usborne*, 11 A. & E. 557.

who trusts a broker has a right to expect that he will not sell in his own name. Hence, where an action was brought by a merchant to recover the price of his own goods, and the demand was resisted on the ground that the defendants, who were buyers of the goods, did not purchase them of the plaintiffs, but of Coles and Co., and that they had a counter demand against Coles and Co., which they were entitled to set off against the price of the goods; it was held, that the defendants had not any right of set-off; for the plaintiffs had not enabled Coles and Co. to appear as proprietors of the goods; and although Coles and Co. had not disclosed the name of their principal, and were merchants as well as brokers, yet in this case they had delivered to the plaintiffs a sold note, in the proper form, supposing them to have sold in their character of *brokers*, and they had delivered to the defendants a bought note, and had not taken any counter note from the defendants; there was enough, therefore, to have raised a strong presumption in the minds of the defendants that the sale was in the character of brokers. Coles and Co. did not say they sold the goods as their own; the defendants did not ask any questions; and further, it appeared that the delivery order had been signed by the plaintiffs (i).

Where a factor to a person beyond sea buys or sells goods for the principal in his own name, an action will lie against him or for him, in his own name; for the credit will be presumed to be given to him in the first case, and in the last the promise will be presumed to be made to him—and the rather so, as it is so much for the benefit of trade (k). “Where the principal resides abroad, he is presumed to be ignorant of the circumstances of the party with whom his factor deals, and therefore the whole credit is considered as subsisting between the contracting parties (l).” “There may be a particular course of dealing with respect to trade in favour of a foreign principal, that he shall not be liable in cases where a home principal would be liable (m).” But the above presumption is one of *fact*, and not of *law*. “Ordinarily, where an English agent contracts on behalf of a principal residing abroad, the agent is *prima facie* considered to pledge his own credit, because it is highly improbable that the person he is contracting with would give credit to the foreigner (n).” But there is no presumption of law to that effect, and therefore, where an agent makes a contract expressly as agent for a foreign principal, and nothing appears in the contract indicative of an intention that the agent shall be personally liable, no action will lie against the agent (o).

(i) *Baring v. Corrie*, 2 B. & Ald. 137.
See *Gordon v. Ellis*, 2 C. B. 821; *Warner v. M'Kay*, 1 M. & W. 591.

(k) *Gonzales v. Sladen*, Bull. N. P. 130.

(l) *Per Chambre, J.*, in *Houghton v. Matthews*, 3 B. & P. 490.

(m) *Per Bayley, J.*, 15 East, 69.

(n) *Mahoney v. Kekulé*, 14 C. B. 390.

(o) *Green v. Kopke*, 18 C. B. 549.

A bill broker who receives a bill merely for the purpose of procuring it to be discounted for his customer, has no right to mix it with bills of his other customers, and to pledge the whole mass as a security for the advance of money (*p*). *Parke*, B., delivering judgment and commenting on the foregoing case in *Foster v. Pearson*, 1 C. M. & R. 856, observed, that in the absence of evidence as to the nature of such an employment, a bill broker must be taken to be an agent to procure the loan of money on each customer's bill separately; and that he had therefore no right to mix bills together, and pledge the mass for one entire sum. In truth, a bill broker is not a person known to the law with certain prescribed duties, but his employment is one which depends entirely upon the course of dealing. It may differ in different parts of the country; it may have bounds more or less extensive in one place than in another. What is the nature of its powers and duties in any instance is a question of fact, and is to be determined by the usage and course of dealing in the particular place.

The law has been settled, by a variety of cases, that an unknown principal, when discovered, is liable on the contracts which his agent makes for him, but this rule must be taken with some qualification; for a party may preclude himself from recovering over against the principal, by knowingly making the agent his debtor (*q*). "I agree that where the seller knows the principal at the time, and yet elects to give credit to the agent, he must be taken to have abandoned his right, and cannot afterwards charge the principal." *Per Bayley, J., S. C.* Where, as on the Stock Exchange, there is a general usage to give credit to the broker, even though the principal be disclosed; but credit is sometimes given to the principal when the broker's credit is not thought sufficient, it is a question for the jury, to which of the two the credit is in fact given (*r*).

The above rule, as to the liability of an undisclosed principal, has been applied to a case where the agent, at the time when he bought the goods of the plaintiff at Liverpool, said that he bought them for a house at Dumfries, for which house he had bought goods of the plaintiff the season before, but did not name the principal, nor did the seller ask it; and although the seller in the meantime debited the agent with the price (*s*). The rule is subject to this further qualification, that the state of the account between the principal and agent has not been altered to the prejudice of the principal, so as to make it unjust for him to be called upon by the plaintiff for the money; as where the seller by his words or conduct induces the principal to believe that a settlement has been come to

(*p*) *Per Lord Lyndhurst*, delivering judgment, *Haynes v. Foster*, 2 Cr. & M. 239.

(*q*) *Per Lord Ellenborough*, in *Paterson v. Grandasequi*, 15 East, 68.

(*r*) *Mortimer v. M'Callan*, 6 M. & W. 58.

(*s*) *Thomson v. Davenport*, 9 B. & C. 78.

between him (the seller) and the agent of the purchaser, in consequence of which the principal pays the amount of the debt to the agent (*t*). So where the seller drew bills on the agent for the price of goods sold, and informed the principal thereof, who thereupon made large remittances to the agent on account of these goods (*u*).

Evidence is admissible, on behalf of one of the contracting parties, to show that the other was agent only, though contracting in his own name, and so to fix the real principal (*v*); but if the agent contracts in such a form as to make himself personally responsible, he cannot afterwards, whether his principal were or were not known at the time of the contract, relieve himself from that responsibility. Thus, where L. and Co., brokers at Liverpool, sold hemp by auction at their rooms, and gave an invoice, describing the goods as "bought of L. and Co.," and received part of the price, but failed to deliver the goods. An action being brought against them by the purchaser for the non-delivery, and for money had and received; it was held that L. and Co. had made themselves responsible as sellers by the invoice; and could not defend themselves by evidence tending to show that they sold as agents, and had intimated that fact before and at the time of the sale, and that, the principals being indebted to L. and Co., the invoice had been made out in their names, according to a custom of brokers in Liverpool, to secure the passing of the purchase-money through their hands (*w*).

In the above case the agents failed to exonerate themselves from liability by proving that the principal was liable. The converse is also true, that the principal cannot exonerate himself by showing that the agent is liable; and in an action against a principal for not accepting tallow (*y*) it was held, that it was not competent to the defendant to give evidence that by the custom of the tallow trade, under certain contracts, a party may reject the undisclosed principal, and look to the broker for the completion of the contract; but where the action was against the broker, such evidence was admitted (*z*). Where the agent expressly contracts as principal, *e. g.*, by describing himself in a charter-party as "owner" of a ship, the principal cannot sue upon the charter-party and give evidence that it was made on his behalf (*a*).

A person who has made a contract as agent for a third person cannot sue as principal without giving notice to the defendant,

(*t*) *Heald v. Kenworthy*, 10 Exch. 739.

(*u*) *Smith v. Anderson*, 7 C. B. 21.
Such a defence is admissible under the general issue, *S. C.*

(*v*) "This evidence in no way contradicts the written agreement. It does not deny that it is binding on those whom on the face of it it purports to bind, but shows that it also binds another, by reason that the act of the agent in signing

the agreement in pursuance of his authority is in law the act of the principal."
Per Parke, B., Higgins v. Senior, 8 M. & W. 844.

(*x*) *Jones v. Littledale*, 6 A. & E. 490.

(*y*) *Trueman v. Loder*, 11 A. & E. 539.

(*z*) *Humfrey v. Dale*, 7 E. & B. 266; see *post*, p. 811.

(*a*) *Humble v. Hunter*, 12 Q. B. 310. See *post*, p. 811.

before action brought, that he is the party really interested (b). "Perhaps it may be doubted whether that case" (*Bickerton v. Burrell*) "was well decided on such a distinction, as it may fairly be argued, that it would have been quite sufficient to prevent any possible inconvenience or injustice, and more in accordance with former authorities, if the court had held, that a party named as agent under such circumstances as existed in that case was entitled, on showing himself to be the real principal, to maintain the action, the defendant being, however, allowed to make any defence to which he could show himself to be entitled, either as against the plaintiff, or as against the person named as principal by the plaintiff in the contract. In many cases, such as contracts, in which the skill or solvency of the person, *who is named as the principal*, may reasonably be considered as a material ingredient in the contract, it is clear that the agent cannot then show himself to be the real principal, and sue in his own name; and perhaps it may be fairly urged, that this, in all executory contracts, if wholly unperformed, or if partly performed, without the knowledge of who is the real principal, is the general rule" (c). The above rule, however, does not apply to cases where the contract is made by the plaintiff as agent, but for an unnamed principal; in such cases, therefore, the plaintiff on showing that he is his own principal, is entitled to recover (d).

Goods sold by a broker for a principal not named, upon the terms, as specified in the usual bought and sold notes (delivered over to the respective parties by the broker) of "*payment in one month, money*," may be paid for by the buyer to the broker within the month, and that payment may be made by a bill of exchange, accepted by the buyer and discounted by him within the month, although such bill had a longer time to run before it became due (e). Where money is paid by an agent upon an agreement made with him in his own name, the principal may recover it back upon the rescinding of the agreement (f). The plaintiffs, who were brokers, bought goods of the defendant on account of H. and by his authority. The purchase was made in their own names, the vendor being told that there was a principal, who, however, was not named. The plaintiffs afterwards, under a general authority from H., contracted to sell the same goods, which the defendant had not yet delivered. H., on hearing of the latter contract, told the plaintiffs that he would have nothing to do with the goods, either as buyer or seller; and to this the plaintiffs assented. The defendant then refused to deliver the goods, and the plaintiffs sued him for damages sustained by them in consequence; it was held, that the renunciation of the contract by H., and the plaintiffs'

(b) *Bickerton v. Burrell*, 5 M. & S. 383.

(e) *Favenc v. Bennett*, 11 East, 36.

(c) *Per Cur.*, *Rayner v. Grote*, 15 M. & W. 359.

(f) *Duke of Norfolk v. Worthy*, 1 Campb. 337.

(d) *Schmaltz v. Avery*, 16 Q. B. 655.

assent thereto, formed no objection to the plaintiffs' right to recover, of which the defendant could take advantage (g).

Lien.—By the general usage of trade, where there is a course of dealings and general account between the merchant and factor, and a balance is due to the factor, he has a lien on all goods in his hands for such balance of the general account, without regard to the time when, or on what account, he received the goods (h). With respect to this general lien it is to be observed:—

1st. That it will not attach until the goods come into the possession of the factor (i).

2ndly. The lien exists during such time only as the factor has possession of the goods; for if he should part with the possession after the lien has attached, the lien is gone (k). But where a factor is in advance for goods by actual payment, or where he sells under a *del credere* commission, whereby he becomes responsible for the price, he has a lien on the price, although he should have parted with the possession of the goods (l). And this rule holds, although money should have been advanced by the factor, at the time when he knew that the principal was in insolvent circumstances (m). The owner of goods, being indebted to a factor in an amount exceeding their value, consigned them to him for sale: the factor, being also similarly indebted to J. S., sold the goods to him. The factor afterwards became bankrupt; and on a settlement of accounts between J. S. and the assignees, J. S. allowed credit to them for the price of the goods, and he then proved the residue of the claim against the estate: it was held, that as the factor had a lien on the whole price of the goods, such settlement of accounts between the vendee and the assignee afforded a good answer to an action against the vendee for the price of the goods, brought either by or on account of the original owner (n).

But where a factor has not any special claim on the goods, and he has disposed of them, whereby he has lost the advantage arising from possession, the debt is to be considered as the debt of the principal, and the factor has no lien on the price. The plaintiff, who was resident in Ireland, employed two persons, as his factors in London, to sell goods for him, which he had sent to them. The factors sold these goods to J. S. for a certain sum; the plaintiff not knowing to whom they were sold, and J. S. not knowing that they belonged to the plaintiff, the goods having been delivered to him as the goods of the factors. The factors, before

(g) *Short v. Spackman*, 2 B. & Ad. 962.

(h) *Kruger v. Wilcox*, Ambl. 252; 1 Kenyon, 32, S. C.; *Gardiner v. Coleman*, cited 1 Burr. 494; and *per Buller*, J., 6 East, 28, n. S. P.

(i) *Kimloch v. Craig*, 3 T. R. 119, 783.

(k) *Sweet v. Pym*, 1 East, 4; and *Bul-*

ler, J., in *Lickbarrow v. Mason*, 6 East, 27, n.

(l) *Drinkwater v. Goodwin*, Cowp. 251. See *Robinson v. Rutler*, 4 E. & B. 957.

(m) *Foxcroft v. Devonshire*, 2 Burr. 931.

(n) *Hudson v. Granger*, 5 B. & Ald. 27.

payment, became bankrupts, and their debts were assigned by the commissioners to the defendants, who afterwards received from J. S. the money for the goods. The plaintiff having brought an action against the defendants for money had and received, the case was reserved by *Holt*, C. J., for the opinion of the Court of King's Bench, who gave judgment, after argument, for the plaintiff (o). This case was afterwards cited before *Parker*, C. J., at the London Sittings, and allowed to be law; because, although it was agreed, that payment by J. S. to the factors, with whom the contract was made, would have discharged J. S. as against the principal, *yet the debt was not in law due to the factors; but to the person whose goods they were;* and therefore it was not assigned to the defendants, by a general assignment of their debts, but remained due to the plaintiff as before; and having been paid to the defendants, who had not any right to have it, it must be considered in law as paid for the use of him to whom it was due; and, consequently, an action might be maintained by him as for money had and received to his use.

The plaintiffs consigned a quantity of tar to R. S., as their factor. There had been mutual dealings between one of the plaintiffs and R. S., the accounts of which were then unsettled. On the arrival of the goods, the factor having received the bill of lading, sold the tar to J. S., to be paid for in promissory notes, payable at four months, and the vendee accordingly gave the factor, in part payment, two promissory notes. Soon afterwards the factor became bankrupt, and the defendants were chosen assignees; they received the money due upon the notes; settled the account with the vendee; and received the balance. An action for money had and received having been brought by the plaintiffs against the assignees for the recovery of the money received on the notes, and the money received on the settlement of the account, it was held, that the plaintiffs were entitled to recover both sums; *Willes*, C. J. (who delivered the opinion of the court), observing, as to the first, that the notes, having been in the hands of the bankrupt at the time of his bankruptcy, were capable of being distinguished from the rest of the bankrupt's estate, and therefore could not be applied to the bankrupt's debts; consequently the plaintiffs were entitled to recover the value of those notes which had been received by the defendants, in like manner as if the goods had remained in specie, unsold in the bankrupt's hands at the time of the bankruptcy, the plaintiffs might have recovered them in an action of trover (p). As to the second sum, the general rule was, that if a person received money which ought to be paid to another, an action would lie as for money had and received; that the assignees having received the money, which belonged to the plaintiffs, they ought to have paid it to the plaintiffs; and not

(o) *Garratt v. Cullum*, cited *Willes*,
405; Bull. N. P. 42, S. C.

(p) *Taylor v. Plumer*, 3 M. & S. 575,
acc.

having done so, this action would lie against them for so much money had and received to the use of the plaintiffs (*q*).

3rdly. A factor has not a lien in respect of debts which have accrued previously to the time at which his character of factor commenced. A., a factor, sold the goods of B., in his own name, to C.: C., without paying for these goods, sent another parcel of goods to A., to sell for him, not having employed A. as a factor before. C. became bankrupt, and his assignees claimed the goods sent by C. to A., which still remained unsold, tendering the charges upon those goods. A. refused to deliver them, claiming a lien upon them for the price of the former goods sold by him to C., the balance between A. and B. being in favour of A. An action of trover having been brought by the assignees against A., for the value of the goods sent by C.; it was held, that they were entitled to recover (*r*).

Liability of Principal.—The maxim that the principal is *civilly* responsible for the acts of his agent (done in the course of the agency), universally prevails both in courts of law and equity (*s*). Upon this principle it was held, by *Holt*, C. J., that a merchant was answerable for the deceit of his factor, who had sold some silk to the plaintiff, as silk of a superior quality, knowing it to be silk of an inferior quality (*t*).

Notice to the principal is notice to all his agents, if there be reasonable time to communicate that notice to the agents before the event which raises the question happens (*u*). So notice to the agent is notice to the principal (*v*).

6 Geo. IV. c. 94.—The law, established by the decisions as to the deposit and pledge of goods, (*ante*, p. 731,) and also that relating to goods shipped in the names of persons who were not the actual proprietors thereof, having been found injurious to the interests of commerce, the 4 Geo. IV. c. 87 was passed to remedy the evil. That act was substantially re-enacted and extended by the 6 Geo. IV. c. 94, usually called "The Factors' Act," by sect. 1 of which it is provided, that—

Any person intrusted for the purpose of consignment or sale with any goods, who shall have shipped such goods in his own name, and any person in whose name any goods shall be shipped by any other person shall be deemed to be the true owner, so far as to entitle the consignee to a lien thereon, in respect of any money or negotiable security advanced or given by such consignee to or for the use of the person in whose name such goods shall be shipped, or in respect of any money or negotiable security received by him

(*q*) *Scott v. Surman*, Willes, 400.

(*r*) *Houghton v. Matthews*, 3 B. & P. 485.

(*s*) 4 T. R. 66, *per Kenyon*, C. J.

(*t*) *Hern v. Nichols*, Salk. 289. See

ante, tit. "Deceit."

(*u*) *Mayhew v. Eames*, 3 B. & C. 601; *Willis v. Bank of England*, 4 A. & E. 21.

(*v*) *Per Ashurst, J.*, 1 T. R. 16.

to the use of such consignee, in like manner and to *all intents and purposes*, as if such person was the true owner; *Provided* such consignee *shall not have notice* by the bill of lading or otherwise, at or before the advance or receipt of the money or security, that the person shipping, or in whose name the goods are shipped, is not the *bonâ fide* owner;—*Provided also*, that the person in whose name such goods are shipped, shall be taken to have been intrusted therewith for the purpose of consignment or sale, unless the contrary appear in evidence.

By sect. 2,—Any person *intrusted with* any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, wharfinger's certificate, warrant or order for the delivery of goods, shall be deemed to be the true owner of the goods described in the said documents, so far as to give validity to any agreement thereafter entered into by such person for the sale or disposition of the goods, or for the deposit or pledge thereof, as a security for any money or negotiable instrument advanced or given by other persons upon the faith of such documents; *Provided* such persons, &c. *shall not have notice* by such documents, or otherwise, that the person intrusted is not the *bonâ fide* owner of the goods so sold or pledged.

The above section only applies to persons intrusted with such documents as factors and agents, and not to the case of a party in possession in his own right (*x*); and a clerk is not an agent within the meaning of the act (*y*). It was held also to give validity only to pledges by a factor of documents with which the real owner had previously intrusted him, and that it did not extend to the pledge of documents created by the factor himself (*z*); except where they were necessary for the purpose of selling the goods, in which case the owner would, in the absence of evidence to the contrary, be held to have impliedly intrusted him with such documents (*a*). "It is very clear," said *Parke, B.*, in delivering the judgment of the Court of Exchequer in *Phillips v. Huth*, "that this section relaxes the rule of the common law only with respect to those who deal with persons, who are not merely in possession of, but are also *intrusted with*, the symbol of property. However great the hardship may be on innocent persons, and whatever they may have supposed from finding another in possession of a document bearing the indicia of property in himself, still the statute does not apply, and they can acquire no title by virtue of it, unless the document has been *intrusted* to that person—not that it is necessary that the owner should have had personal possession of the document so as to be able to mark it with his name, and himself delivered it to the

(*x*) *Jenkyns v. Usborne*, 7 M. & G. 678.

(*y*) *Lamb v. Attenborough*, 1 B. & S. 831.

(*z*) *Per Alderson, B.*, in *Close v. Holmes*,

2 M. & Rob. 25; but see the observation of *Alderson, B.*, in *Phillips v. Huth*, 6 M. & W. 580.

(*a*) *Hatfield v. Phillips*, 9 M. & W. 647; (*in error*) 14 M. & W. 665.

factor; for if his own agent, general or special, puts it into the hands of the factor with the factor's name on it, or if the factor be instructed by the owner to obtain the document in that state, and does so, no doubt he is '*intrusted*' by the owner with it within the meaning of the act. But in order to constitute an *intrusting* of such a document, it is necessary that the owner should have intended the factor to *possess it in that form*, at the time when he had the possession. *Intrusting* with the document is essentially different from enabling a person to become possessed of it—from giving him the means of obtaining it." The 5 & 6 Vict. c. 39 (*post*) was passed to obviate the difficulties raised by this construction.

Persons who would avail themselves of the provisions of the act, must prove the agreement (b). In this case the defendant had received, by way of pledge, India warrants from the plaintiff's broker, who had been intrusted with them, without any authority to pledge or sell, under a written agreement. It was held, that the defendant was bound to produce the agreement, on which he relied. East India warrants are not negotiable securities within the above section (c).

By sect. 3,—In case any person shall accept any such goods in deposit or pledge from any person so intrusted, *without notice* as aforesaid, as a security for any debt or demand due from the person so intrusted *before* such deposit or pledge, then such person, so taking such goods in deposit or pledge, shall acquire no further right in the goods or any such document, than was possessed by the person so intrusted at the time of such deposit or pledge; but such person shall and may acquire and enforce such right as was possessed by the person so intrusted. "The act says, without notice from the documents 'or otherwise.' A person may have knowledge of a fact either by direct communication or by being aware of circumstances which must lead a reasonable man, applying his mind to them and judging from them, to the conclusion, that the fact is so" (d). Where A. deposited dock warrants as a security for the advance of money and afterwards withdrew them and substituted other dock warrants, it was held, under this section, that the pledgee obtained no greater right to the dock warrants so substituted than A. had at the time of the pledge; and that A. had no right, there having been no *advance* of money on the faith of such warrants (e).

By sect. 4,—Any person, &c. may contract with any *agent intrusted with any goods*, or to whom the same may be consigned, for the purchase of any such goods, and receive the same of, and

(b) *Evans v. Truman*, 2 B. & Ad. 886.

(c) *Taylor v. Kymer*, 3 B. & Ad. 320, where see as to what is a *sale* or *disposition* within the section. But see 5 & 6 Vict. c. 39, *post*, p. 744.

(d) *Evans v. Trueman*, 1 M. & Rob. 12, *per* Lord Tenterden, C. J.

(e) *Bonzi v. Stewart*, 4 M. & G. 295; but see 5 & 6 Vict. c. 39, *post*, p. 744.

pay the same to, such agent; and such contract and payment shall be binding against the owner of such goods, *notwithstanding such person shall have notice*, that the person making such contract, or on whose behalf such contract is made, is an agent, provided such contract and payment be made in the usual and ordinary course of business, and that such person shall not, when such contract is entered into or payment made, have notice that such agent is not authorized to sell the goods or to receive the purchase-money. It is difficult to say precisely what is meant by "an agent intrusted with goods:" but a wharfinger is not such a person (*f*).

The plaintiffs, cloth manufacturers, were applied to by E., who was a factor and commission agent, for a sample of their cloths on the representation that S. would purchase a certain number of ends. E. had no authority from S., and having obtained possession of the cloth, for purchasing which he was to receive one shilling an end, sold it to the defendants, who bought the cloth *bonâ fide*: it was held, that E. was an agent "intrusted" with the cloth within s. 4 (*g*).

By sect. 5,—Any person, &c. may take any such goods or *document* in deposit or pledge from any such factor or agent, *notwithstanding such person shall have notice*, that the person making such deposit or pledge is a factor or *agent*; but then such person shall acquire no further right to the goods, or document for the delivery thereof, than was possessed or might have been enforced by the factor or agent at the time of such deposit or pledge; but such person shall and may possess and enforce such right as was possessed and might have been enforced by such factor or agent at the time of such deposit or pledge. The right of a factor to pledge under this section depends upon the question whether, upon the *whole* account between them, the principal is indebted to the factor (*h*). A broker having accepted bills for his principal on the security of goods then in his hands, pledged the goods with a person who had notice of the agency, but did not inform the principal of this transaction; it was held, that under this section the broker could transfer such right only as he had, which was a right to be indemnified against the bills which he had accepted, and that the principal, having satisfied those bills, was entitled to have back his goods from the pawnee without paying the amount for which they were pledged (*i*). The provision in this section refers to a deposit or pledge only, made distinctly as such (*k*).

It is, however, provided, by sect. 6, that nothing shall be construed to prevent the true owner of the goods from recovering the same from his factor or agent *before* a sale, deposit, or pledge, or

(*f*) *Monk v. Whittenbury*, 2 B. & Ad. 486. See as to the meaning of the word "intrusted," *ante*, p. 741, *Phillips v. Huth*, 6 M. & W. 580.

(*g*) *Baine v. Swainson*, 4 B. & S. 270.

(*h*) *Robertson v. Kensington*, 5 M. & Ry. 381.

(*i*) *Fletcher v. Heath*, 7 B. & C. 517.

(*k*) *Thompson v. Farmer*, M. & Malk. 48.

from the assignees of such factor or agent in the event of his bankruptcy; nor to prevent the owner from recovering from any person the price agreed to be paid for the purchase of such goods, subject to any right of set-off on the part of such person against the factor or agent; nor to prevent the owner from recovering from such person the goods deposited or pledged, upon repayment of the money, or on restoration of the negotiable instrument advanced to the factor or agent, and upon payment of such further sum of money or on restoration of such other negotiable instrument (if any) as may have been advanced by the factor or agent to the owner, or on payment of money, equal to the amount of such instrument; nor to prevent the owner from recovering from such person any balance remaining in his hands as the produce of the sale of the goods, after deducting the money or negotiable instrument advanced: *Provided* that in case of the bankruptcy of the factor or agent, the owner of the goods so pledged and redeemed shall be held to have discharged *pro tanto* his debt to the estate of such bankrupt (*l*).

5 & 6 Vict. c. 39.—It being afterwards considered desirable that the same protection should be afforded to *bonâ fide advances* upon goods, as by the 6 Geo. IV. c. 94, s. 4, was given to *sales*; and much uncertainty having arisen on the construction of that act (see *Phillips v. Huth*, *ante*, p. 741), which, moreover, did not extend to protect *exchanges* of securities *bonâ fide* made (see *Bonzi v. Stewart*, *ante*, p. 742), it was enacted, by 5 & 6 Vict. c. 39, s. 1—That any agent who shall be intrusted *with the possession* of goods, or of the documents of title to goods, shall be deemed to be the owner of such goods and documents, so far as to give validity to any agreement by way of *pledge, lien, or security bonâ fide* made by any person with such agent, as well for any original loan, advance, or payment made upon the security of such goods or documents, *as also for any further or continuing advance in respect thereof*; and such agreement shall be binding upon the owner of such goods, and all other persons interested therein, notwithstanding the person claiming such pledge or lien may have had notice that the person with whom such agreement is made is only an agent. Furniture in a furnished house is not “goods” within the act (*m*). The plaintiff, a manufacturer, consigned goods to C., his agent. C. being liable, together with the defendant, on a bill of exchange, obtained from him 300*l.* for the purpose of taking up the bill, at the same time depositing with him the plaintiff’s goods. In trover by the plaintiff for his goods, it was held, that, if the jury thought the transaction was only a circuitous mode of paying the bill, it was not a transaction within the statute (*n*). The act does not apply to the case of master and servant, and

(*l*) See 12 & 13 Vict. c. 106, s. 179.

(*m*) *Wood v. Rowliffe*, 6 Hare, 191.

(*n*) *Learoyd v. Robinson*, 12 M. & W. 745.

therefore a clerk authorized by his master to receive dock warrants is not an agent within the meaning of the act (o).

By sect. 2,—Where any such agreement for pledge, lien, or security shall be made in consideration of the delivery to such agent of any *other* goods or merchandize, or document of title or negotiable security, upon which the person so delivering up the same had at the time a valid lien and security in respect of a *previous* advance, by virtue of some agreement made with such agent, such agreement, if *bond fide* on the part of the person with whom the same is made, shall be deemed to be a contract made in consideration of an advance within the meaning of the act, and shall be as valid as if the consideration for the same had been a *bond fide present advance* of money: *Provided*, that the lien acquired under such last-mentioned agreement upon the goods or documents deposited in exchange shall not exceed the value at the time of the goods, which (or the documents of title to which, or the negotiable security which) shall be delivered up and exchanged (p).

Sect. 3 provides,—“That this act shall give validity to such contracts and agreements only and to protect only such loans, advances, and exchanges as shall be made *bond fide*, and without notice that the agent making such contracts or agreements as aforesaid, has not authority to make the same, or is acting *mala fide* in respect thereof against the owner of such goods and merchandize; and nothing herein contained shall be construed to extend to or protect any lien or pledge for or in respect of any *antecedent* debt (q), owing from any agent to any person with or to whom such lien or pledge shall be given, nor to authorize any agent intrusted as aforesaid in deviating from any express orders or authority received from the owner; but that, for the purpose and to the intent of protecting all such *bond fide* loans, advances, and exchanges as aforesaid (although made with notice of such agent not being the owner, but without any notice of the agent's acting without authority), and to no further or other intent or purpose, such contract or agreement as aforesaid shall be binding on the owner and all other persons interested in such goods.” In order to deprive a transaction of the protection given by the 1st section, and to bring it within the proviso of the 3rd section, that the jury should find categorically that the lender had notice of the agent's *mala fides* or want of authority (r).

By sect. 4,—“Any bill of lading, India warrant, dock warrant, warehouse keeper's certificate, warrant or order for the delivery of goods, or *any other document used in the ordinary course of business as proof of the possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by*

(o) *Lamb v. Attenborough*, 1 B. & S. 831.

(p) See *Bonzi v. Stewart*, ante, p. 742.

(q) See *Taylor v. Kymer*, 3 B. & Ad. 320.

(r) *Gobar Chunder Sein v. The Administrator-General of Bengal*, 8 Jur. 343, Priv. C.

delivery, the possessor of such document to transfer or receive goods thereby represented," shall be deemed to be a document of title within the act; and any agent intrusted with and possessed of any such document, whether immediately from the owner, "or obtained by reason of such agent's having been intrusted with the possession of the goods, or of any other document of title thereto" (s), shall be deemed to have been intrusted with the possession of the goods represented by such document of title; and all contracts pledging or giving a lien upon such document shall be deemed to be pledges of and liens upon the goods to which the same relates, and such agent shall be deemed to be possessed of such goods or documents, whether the same shall be in his actual custody or shall be held by any other person subject to his control or on his behalf; and where any loan or advance shall be *bond fide* made to any agent intrusted with and in possession of any such goods or documents, on the faith of any agreement in writing to consign, deposit, transfer, or deliver, such goods or documents, and such goods or documents shall actually be received by the person making such loan or advance without notice that such agent was not authorized to make such pledge or security, every such loan or advance shall be deemed to be a loan or advance on the security of such goods or documents within the act, though such goods or documents shall not actually be received by the person making such loan or advance till the period subsequent thereto; and any agreement, whether made direct with such agent, or with any other person on his behalf, shall be deemed an agreement with such agent; and any payment made, whether by money or bills of exchange, or other negotiable security, shall be deemed to be an advance within the meaning of the act; and an agent in possession as aforesaid of such goods or documents shall be taken to have been intrusted therewith by the owner, unless the contrary be shown in evidence.

By sect. 5,—Nothing is to lessen the civil responsibility of an agent for any breach of duty or contract, or non-fulfilment of his orders or authority in respect of any such agreement, lien, or pledge. Section 7 provides for the redemption of the goods by the owner before sale upon repayment of the lien (both to the defendant and the agent) and restoration of the securities; for his recovery from the pledgee of the balance of the proceeds, after deducting the pledgee's lien; and for the case of the bankruptcy of the agent (t).

(s) See *Close v. Holmes*, 2 M. & Rob. 25; and *Hatfield v. Phillips*, 14 M. & W. 665, *ante*, p. 741.

(t) See the Bankrupt Law Consolidation Act, 12 & 13 Vict. c. 106, s. 179.

CHAPTER XXI.

FISHERY.

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I. *Of the Right of Fishery in the Sea, and in the Creeks and Arms thereof, and in Fresh Rivers.*

“THE right of fishing in the sea (*a*), and the creeks and arms thereof, is originally lodged in the crown, in like manner as the right of fishing in a private or inland river is originally lodged in the owner thereof. But although the king is the owner, and, as a consequence of his property, hath the primary right of fishing in the sea, or creeks or arms thereof, yet all the king’s subjects in England have regularly a liberty of fishing in the sea, and the creeks and arms thereof, as a public common of piscary, and may not, without injury to their right, be restrained of it, unless in such places, creeks, or navigable rivers, where the king, or some particular subject, hath gained a propriety exclusive of that common liberty, either by the king’s charter or grant, or by custom and usage, or prescription.” It appears from this passage, that Lord *Hale* thought an exclusive right of fishery in an arm of the sea might belong to a subject (*b*). And of this opinion were the Court of B. R. in another case (*c*), where it was decided, that a plea, which prescribed for a several fishery in an arm of the sea, was good; but it was there said, that, as the presumption in such case was in favour of the king and public, it was incumbent on the plaintiff to prove his exclusive right, agreeable to the rule laid down by Lord *Hale*, in 1 Mod. 105, that if any one will appropriate a privilege to himself, the proof lies on his side. . So it was

(*a*) Lord *Hale*, *De Jure Maris*, p. 1, c. 4; Hargrave’s Tracts, vol. 1, p. 11. See also the case of *The Royal Fishery of the Banne*, Dav. R. 55.

(*b*) See also 8 Edw. IV. 19, *u.*; 4 T.

R. 439, *S. P.*, admitted by *Kenyon*, C.J., and *Ashhurst*, J.

(*c*) *Carter and another v. Murcot and another*, 4 Burr. 2162.

held (*d*), that all the subjects of England, of common right, might fish in the sea, it being for the good of the commonwealth, and for the sustenance of the people of the realm, and that therefore a prescription for it, as appurtenant to a particular township, was void, and as absurd as a prescription would be for travelling the king's highway, or for the use of the air as appurtenant to a particular estate. To trespass for fishing in the plaintiff's fishery, defendant pleaded, that the place was an arm of the sea, in which every subject had a right to fish; the plaintiff in his replication claimed an exclusive right by prescription, traversing the general right. It was held, that this was a bad and immaterial traverse, and might be passed over by the defendant, and that it was competent to him to traverse the prescriptive right of the plaintiff stated in the replication (*e*). The preservation of the spawn, fry, or brood of fish, has been, for centuries, a favourite object of legislation, and the statutes passed for the purpose are extremely numerous; thus dredging for oyster spat in a common navigable river is illegal under the stat. 13 Ric. II. stat. 1, c. 19, which has never been repealed, but frequently recognized (*f*). In one case (*g*) the Court seem to have been of opinion, that *prima facie* every subject has a right to take fish found on the sea shore between high and low watermark, but that such general right might be restrained by an exclusive right in an individual.

The bed of all navigable rivers, and of estuaries, is vested in the crown, but the ownership of the crown is for the benefit of the subject, and is subservient to the paramount right of the subject to free navigation, and the right to anchor is a necessary part of the right of navigation. The grantee of the crown takes the soil subject to the same public right of navigation. Where, therefore, a subject claims anchorage tolls in respect of ships, it is not enough to prove a grant of the soil and immemorial user, for such a claim can only be sustained by proving that some consideration was given for the right to levy tolls, or a corresponding advantage to the public, such as the right of haven. Where, therefore, the proprietors of an oyster fishery claimed to levy tolls on all ships anchoring within the limits of their fishery, and proved immemorial user, it was held that such a claim could not be sustained without proof of a consideration given (*h*).

Fresh rivers, of what kind soever, of common right belong to the owners of the soil adjacent (*i*); so that the owners of the one side

(*d*) *Ward v. Cresswell*, Willes' Rep. 265, and 16 Vin. Abr. 354, tit. "Piscary," (B.).

(*e*) *Richardson v. The Mayor, &c., of Oxford*, 2 H. Bl. 182.

(*f*) *Mayor, &c., of Maldon v. Woolvet*, 12 A. & E. 13.

(*g*) *Bagott v. Orr*, 2 Bos. & Pul. 472.

(*h*) *Gann v. Free Fishers of Whitstable*, 34 L. J., C. D. 29.

(*i*) Lord Hale, *De Jure Maris*, p. 1, c. 1; Hargrave's Tracts, vol. 1, p. 5; Davis's R. 57, u. b. See as to the evidence of ownership of rivers, *Jones v. Williams*, 2 M. & W. 326.

have, of common right, the propriety of the soil, and consequently the right of fishing, *usque filum aquæ*, and the owners of the other side the right of soil or ownership, and fishing unto the *filum aquæ* on their side. And if a man be owner of land on both sides, in common presumption he is owner of the whole river and hath the right of fishing according to the extent of his land in length. But special usage may alter that common presumption; for one may have the river, and others the soil adjacent; or one may have the river and soil thereof, and another the free or several fishery in that river. "Where a private river is the boundary of two persons' lands, the soil *ad filum aquæ* belongs to the owners of the lands on each side, unless there have been immemorially acts of ownership exercised by one or the other" (k).

II. Of the different Kinds of Fishery.

Several Fishery, p. 751.

Free Fishery, p. 753.

Common of Fishery, p. 755.

A *several* fishery is where a person has an exclusive right of fishery, either in his own soil or in the soil of another (l). "In order to constitute a *several* fishery, it is requisite that the party claiming it should so far have the right of fishing independently of all others, as that no person should have a co-extensive right with him in the object claimed. But a partial independent right in another, or a limited liberty, does not derogate from the right of the general owner" (m). He who has a *several* fishery is not necessarily the owner of the soil (n); but as the exclusive right of fishing is an incident to the ownership of the soil, it will be presumed, until the contrary be shown, that such right resides in the owner of the soil (o). Trespass lies for an injury to a right of *several* fishery (p), the allegation of a *several* fishery *prima facie* importing ownership of the soil (q), but it is a good plea that the soil and freehold belong to the defendant. To this, however, the plaintiff may reply title to the *several* fishery, either by prescription or grant, thereby rebutting the presumption of the right of *several* fishery being still vested in the owner of the soil (r). The description of such a fishery "as a sole and exclusive fishery," is

(k) *Per Wilmot, J., Sparks v. Lloyd*, Worcester Spring Ass. 1757, MSS.

(l) *Fitz. Abr. Barre*, pl. 27, cites M. 20 Hen. VI. 4.

(m) *Per Lord Mansfield, C. J.*, delivering the resolution of the court, *Seymour and others v. Lord Courtenay and others*, 5 Burr. 2814.

(n) *Hargrave's Notes*, Co. Litt. 122, a. n. (7).

(o) See 5 B. & C. 886.

(p) *Holford v. Bailey*, 13 Q. B. 426; *S. C. (in error)*, 18 L. J., Q. B. 109.

(q) *Marshall v. The Ulleswater Steam Navigation Company*, 3 B. & S. 732.

(r) 17 Edw. IV. 6, b.; 18 Edw. IV. b. *Per Paston, J.*, 18 Hen. VI. 30, a.; *Fitz. Abr. Barre*, pl. 20. *S. C.* See also *Holford v. Bailey*, 18 L. J., Q. B. 109.

sufficient, and equivalent to that of a several fishery (s). Where a subject was owner of a several fishery in a navigable river, where the tide flowed and reflowed, which fishery had been granted to him before Magna Charta, by the description of *separalis piscaria*; it was held, that it was an incorporeal and not a territorial hereditament, and that a term for years in it could not be created without deed (t).

If a person be seised of a river, and by deed grant a several fishery in the same, and makes livery of seisin *secundum formam cartæ*, the soil does not pass; and if the river becomes dry, the grantor may take the benefit of the soil, for a particular right only passed to the grantee (u). A prescriptive right to a several fishery in a navigable river may pass as appurtenant to a manor (x). A right of fishery is divisible, and may be abandoned as to part, while another part is preserved. Hence, an exclusive right to dredge for oysters may subsist as appurtenant to a manor, although it be lawful for all the king's subjects to catch floating fish therein. Trespass for breaking and entering his close, and fishing in *separali piscariâ suâ*, and for taking *pisces suos*. After verdict, exception was taken to the declaration in arrest of judgment, because it is said *pisces suos*. But the Court were of opinion, that being in *separali piscariâ*, it might well be said *pisces suos*, because they could not be taken by any other person (y). Where (z) the declaration stated that defendant, in *separali suâ piscariâ piscatus fuit, et pisces cepit*, after verdict for plaintiff, an exception in arrest of judgment, directly the reverse of that in the foregoing case, was taken, viz., that the declaration had omitted the word *suos*; but the Court thought the objection entitled to very little weight; because the plaintiff having alleged that it was his fishery, the fish there should be intended *primâ facie* to be his fish. A, being seised of a mill, and having a sole fishery in the waters of the mill, granted the mill, with all waters, streams, &c., necessary in working the same, "except, and always reserving, the right and privilege of fishing in the waters of the said mill." It was held, that this was an exception of the sole fishery, and not a reservation of a new easement (a).

Though Magna Charta made illegal all grants by the crown of a several fishery in a navigable river which had not been in existence in the reign of Henry II., yet if evidence now be given of long enjoyment of a fishery there to the exclusion of others of such a character as to establish that it has been dealt with as of right as a distinct and separate property, and there is nothing to show that

(s) *Holford v. Bailey*, *supra*.

(t) *Duke of Somerset v. Fogwell*, 5 B. & C. 875.

(u) 1 Inst. 4, b. But see Hargrave's note.

(x) *Rogers v. Allen*, 1 Campb. 309.

(y) *Child v. Greenhill*, Cro. Car. 553; Sir W. Jones, 440, S. C.

(z) *Fontleroy v. Aylmer*, Ld. Raym. 239.

(a) *Lord Paget v. Milles*, 3 Doug. 43.

its origin was modern, the reasonable presumption is that it became such in due course of law, and therefore must have been created before legal memory (b).

Free Fishery.

It is to be lamented that the books do not afford materials for an accurate description of a free fishery. That this subject is involved in doubt and uncertainty, will appear from the following passages, extracted from the writings of Mr. Justice Blackstone and Mr. Hargrave:—

Mr. J. Blackstone, having defined common of fishery to be a liberty of fishing in another man's water (c), states a free fishery to be an exclusive right of fishing in a public river, and adds, "that it is a royal franchise, and is considered as such in all countries where the feudal polity has prevailed; though the making such grants, and thereby appropriating what seems to be unnatural to restrain, the use of running water, was prohibited for the future by King John's great charter (d); and the rivers that were fenced in his time were directed to be laid open. This opening was extended by the second and third charters of Henry III. to those also which were fenced under Richard I., so that a franchise of free fishery ought to be as old as the reign of Henry II. This differs from a *several* fishery, because he that has a *several* fishery must also be (or at least derive his right from) the owner of the soil, which in a free fishery is not requisite. It differs from a common of piscary, in that the free fishery is an *exclusive* right; the common of piscary is not so; and therefore, in a free fishery, a person has a property in the fish before they are caught; in a common of piscary, not until afterwards. Some, indeed, have considered a free fishery, not as a royal franchise, but merely as a private grant of a liberty to fish in the *several* fishery of the grantor. But the considering such right as originally a flower of the prerogative, till restrained by Magna Charta, and derived by royal grant, previously to the reign of Richard I., to such as now claim it by prescription, and to distinguish it, as we have done, from a *several* and a *common* of fishery, may remove some difficulties, in respect to this matter, with which our books are embarrassed." On this passage Mr. Hargrave made the following remark (e): "Both parts of this description of a free fishery seem disputable. With regard to the first part, although for the sake of distinction it might be more convenient to appropriate free fishery to the franchise of fishing in public rivers by derivation from the crown; and although in other countries it may be so considered, yet, from the language of our books, it seems as if, in our law, practice had extended this kind of

(b) *Malcomson v. O'Dea*, 10 H. of L. Cases, 593.

(c) 2 Bl. Com. 39, 40; Edn. 12.

(d) See *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

(e) Hargrave's Co. Litt. 122, a. n. 7.

fishery to all streams, whether private or public: neither the register nor other book professing any discrimination. Reg. 95, b. *F. N. B.* 88, G.; Fitz. Abr. Ass. 422; 17 Edw. IV. 6, b.; 7, a.; 7 Hen. VII. 13, b. With respect to the second part, it is true, that in *Smith v. Kemp*, 2 Salk. 637; Carth. 285, the court held free fishery to import an exclusive right equally with several fishery, chiefly relying on the writ in the Register, 95 b., and the 46 Edw. III. 11, a. But then this was only the opinion of two judges (f) against one (g), who strenuously insisted, that the word *libera ex vi termini*, implied common, and that many judgments and precedents were founded on Lord Coke's so construing it. That the dissenting judge was not wholly unwarranted in the latter part of his assertion, appears from two determinations a little before the case in question, viz. *Upton v. Dawkin*, 3 Mod. 97, where judgment was arrested in trespass for breaking and entering a free fishery; because the declaration alleged the fish taken to be the fish of the plaintiff; and *Peake v. Tucker*, cited in margin, Carth. 286, where judgment was arrested on the same ground." After the preceding remarks were published, Mr. J. Blackstone, with that candour and liberality which are the inseparable companions of true learning, added the following observation, in a subsequent edition of his Commentaries: "It must be acknowledged, that the right and distinctions of the three species of fishery are very much confounded in our law books: and there are not wanting respectable authorities (see them well digested in Hargrave's notes on Co. Litt. 122 (23),) which maintain that a *several* fishery may exist distinct from the property of the soil, and that a *free* fishery implies no exclusive right, but is synonymous with common of piscary." Whatever be the nature of free fishery, whether it be, as Mr. J. Blackstone supposes, an exclusive right, or as Mr. Hargrave seems to think, only the same with common of fishery; since the case of *Smith v. Kemp*, before mentioned, it is too late now to contend, that an action of trespass, *vi et armis*, will not lie for an injury to it. It should be remarked, however, that the declaration in *Smith v. Kemp*, was for breaking and entering the *close* of the plaintiff, and fishing in the free fishery of the plaintiff *in the said close*. See Carthew's Rep. p. 285. It may admit of a question, whether the declaration ought to state the fish taken to be the fish of the plaintiff. It seems, that such allegation ought to be made.

The Prescription Act, 2 & 3 Will. IV. c. 71, does not apply to easements or profits *à prendre* in gross, *e. g.* to a claim of "a free fishery" in the waters of another (h). Nor can a profit *à prendre* be claimed by custom because of the tendency of such a claim to exhaust the profit of the land, and leave nothing for the owner, which is deemed unreasonable (i). Hence a general custom to

(f) *Holt*, C. J., *Dolben*, J.

(g) *Eyre*, J.

(h) *Shuttleworth v. De Fleming*, 19 C.

B. (N. S.) 687; 34 L. J., C. P. 309.

(i) *Race v. Ward*, 4 E. & B. 702; 26 L. J., Q. B., 133.

angle for fish is void (*j*), at any rate without payment. Perhaps the fact of payment might be deemed to be a sufficient restriction on the one hand, and satisfaction for the profit taken on the other, to make the custom reasonable (*k*). But there can be no right to obtain leave and licence to fish upon payment founded upon custom; for every act of fishing must have been by licence, and so there can have been no enjoyment as of right, which is necessary equally in the case of custom as in that of prescription (*l*).

Common of Fishery.

A common of fishery is a right of fishing in common with other persons in a stream or river, the soil whereof belongs to a third person. This does not differ in any respect from any other right of common, and trespass will not lie for an injury to it (*m*). A person having a common of fishery in another's land, cannot cut the grass growing on the bank (*n*). Under ancient deeds recognizing a right in the owner of an estate to have a weir across a river for taking fish, if it appear that such weir was heretofore made of brushwood, through which the fish might escape into the upper part of the river, he cannot convert it into a stone weir, whereby the possibility of escape is debarred, except in times of extraordinary flood (*o*). Weirs erected in public rivers before the time of Edw. I., although an obstruction to navigation, are legalized by subsequent acts of the legislature (*p*). The right of the public to navigate a public river is paramount to any right of property in the crown, which never had the power to grant a weir so as to obstruct the public navigation; and if a weir, which was legally granted in such a river caused obstruction at any subsequent time, it became a nuisance (*q*).

The effect of the statutes relating to weirs, from Magna Charta to 12 Edw. IV. c. 7, is to make weirs in navigable rivers illegal, unless they existed before the time of Edward I., in which case they are rendered legal by virtue of 25 Edw. III. st. 4, c. 4; but these various statutes do not prevent the right to erect a weir in a non-navigable river from being acquired as an easement (*r*).

Evidence.

M. brought an action against O. for breaking his several fishery in a public navigable river. At the trial, M., who was tenant of the corporation of L., gave in evidence a reconveyance by P. to the corporation of the fishery in question, dated 1684,

(*j*) *Bland v. Lipscombe*, 4 E. & B. 713, n.

(*k*) *Tyson v. Smith*, 9 Ad. & E. 406.

(*l*) *Mills v. Mayor of Colchester*, L. R., 2 C. P. 486.

(*m*) Salk. 637.

(*n*) 13 Hen. VIII. p. 15, b.

(*o*) *Weld v. Hornby*, 7 East, 195.

(*p*) *Williams v. Wilcox*, 3 Nev. & P. 606.

(*q*) *S. C.* See also *Mayor of Colchester v. Brooke*, 7 Q. B. 339.

(*r*) *Rolle v. Whyte*, L. R. 3, Q. B. 302.

and in order to show there had been previously a pending suit between P. and the corporation, each claiming under conflicting grants from the crown, M. gave in evidence a bill filed by P. in the Court of Chancery against the corporation, with their answer, dated 1674. On exception to this evidence it was held by the House of Lords (reversing the decision of the Irish Exchequer Chamber) that such evidence was admissible as part of the history of the adverse claim of P., which ended in P.'s reconveyance to the corporation. At the trial, in order to prove the ancient possession of the fishery, M. gave in evidence an assembly book of the corporation, containing entries showing that the fishery was then let for certain rents to a tenant. It was also held that such book was admissible, for the rule is that ancient documents coming out of the proper custody, and purporting on the face of them to exercise ownership, such as a lease or a licence, may be given in evidence without proof of possession or payment of rent under them, as being in themselves acts of ownership and proofs of possession (s).

The mere circumstance of the owners of an oyster fishery having for a period of one hundred and fifty years received a fee of two guineas for a licence for four dredges, will not, in the absence of all evidence on the subject, warrant the assumption that three guineas is an unreasonable sum to demand for such a licence (t).

The English sea, oyster, and salmon fisheries are regulated by the following statutes: sea and oysters, by 31 & 32 Vict. c. 45 (except as to the Medway); salmon, by 24 & 25 Vict. c. 109, and 28 & 29 Vict. c. 121.

* (s) *Malcomson v. O'Dea*, 10 H. of L. Cases, 593.

(t) *Mills v. The Mayor of Colchester*, L. R. 3, C. P. 575, in error.

END OF VOL. I.

